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July 27, 2009

Tara Veazey
Chairperson
Montana Public Defender Commission
44 West Park Street
Butte, Montana 59701

RE: Assessment of the Initial Period of Operations of the Montana Statewide Public Defender System. BJA Criminal Courts Technical Assistance Project.

Dear Tara:

This letter is in follow up to our previous communications regarding the above referenced draft report which we sent July 15th for the Commission's review. As I have indicated, we would appreciate receiving the Commission's comments regarding the accuracy of the report's observations and any factual findings upon which they are based, as well as the adequacy of the report's coverage of the issues generating Jim Taylor's 2008 request for technical assistance.

Please let me know if it will not be possible to provide us with the Commission's comments by Friday, August 7th.

We look forward to hearing from you.

Sincerely,

A handwritten signature in blue ink that reads "Caroline S. Cooper".

Caroline S. Cooper
Associate Director
BJA Criminal Courts Technical Assistance Project

CSC/jd

CRIMINAL COURTS TECHNICAL ASSISTANCE PROJECT

A PROGRAM OF THE BUREAU OF JUSTICE ASSISTANCE, U.S. DEPARTMENT OF JUSTICE

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SCHOOL OF PUBLIC AFFAIRS
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BJA Criminal Courts Technical Assistance Project: TA Report No. 4-072

**Assessment of the Initial Period of Operations of the Montana Statewide
Public Defender System**

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July 2009

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APPENDICES

- A. Memorandum to Public Defender Commission, Randi Hood, and OPD Attorneys and staff from Daniel Donovan. Self-Evaluation: ABA Ten Principles of a Public Defense System. April 15, 2008

- B.**
- (1) Letter from Daniel Donovan to Tara Veazey, Chair, Montana Public Defender Commission. February 9, 2009.**
 - (2) Motion for Counsel in Initial Appearance. Submitted by Daniel Donovan. Eighth Judicial District Court, Cascade County (March 16, 2009)**
 - (3) State of Montana Vs. David Pando. Order to Provide Assistance of Counsel to Indigent Defendants at Initial Appearance. Eighth Judicial District Court, Cascade County, March 19, 2009**

DRAFT

I. INTRODUCTION

A. BACKGROUND OF THIS STUDY

On July 1, 2006, the Office of the State Public Defender of Montana (OPD) opened its doors. The structure of the office included a headquarters office, as well as a regional office, in Butte plus ten additional regional offices with full and part-time staff personnel, and a group of contract lawyers in private practice, appointed to handle overflow cases and cases involving multiple defendants where there might be a conflict of interest. In at least three of the regional offices, these contract lawyers in private practice serve as the primary method of delivery of legal services to the indigent. The OPD also comprises administrative and supervisory staff, including a chief public defender, as well as a Board of Commissioners, whose job it has been to set standards and goals and supervise the operation of the Agency. In addition, the Board has met monthly, receiving reports from the Chief Defender and acting as a liaison with the Montana Legislature, which created the OPD.

In June, 2008, the then Chairman of the Board of Commissioners, James Taylor, requested BJA's Criminal Courts Technical Assistance Project (CCTAP) at American University to evaluate how the system was working. Specifically, he asked that "...all 11 regions be visited and input obtained from staff attorneys, judges, clients, and others....to identify the strengths and weaknesses of the system that has been implemented, and ways to improve the delivery of services." In light of the limited resources available to the CCTAP, it was agreed that the CCTAP assessment would focus on a study of the OPD operations in a sample of representative regions that reflected the issues and environments relevant to implementation of the OPD system.

In addition to CCTAP staff Caroline S. Cooper and Joseph A. Trotter, Jr., CCTAP Associate Director and Director, the CCTAP designated three consultants who had been defender practitioners as well as active in the development of national indigent defense delivery standards to provide the requested technical assistance: Judge Shelvin Singer (Ret.) of Chicago, Illinois, who had served on the Circuit Court for Cook County and had been active in the development of national defender standards; James Hennings, former director of the Metropolitan Defender Office in Portland, Oregon, and Marshall Hartman, former National Director of Defender Services for NLADA and former Chief of Public Defender Services for Lake County, Illinois. Judge Singer has served as study team leader. Ms. Cooper provided overall coordination for the study effort and both Ms. Cooper and Mr. Trotter participated in the site work and in preparation of this report. Ms. Cooper and Mr. Trotter are former assistant public defenders, and have conducted numerous studies of state and local justice system operations generally and defender services specifically.

Site work, further described below, was conducted during the August 2008 – January 2009 period and entailed visits to the Headquarters Office in Butte as well as the regional offices in Billings, Butte, Helena, and Missoula. During these visits, the study team met with the Chief Defender, the Administrative Director, other Headquarters Office staff as well as the

regional public defender staff of the offices visited and available judicial system officials and attorneys. In addition, the study team communicated through email and telephone with over 50 additional individuals from across the state, including members of the private bar, legislators, current and former Commission members, and public defender office staff and contract attorneys.

Difficulties in communication and coordination of the study team's site visit schedules and compiling requisite supporting information prolonged the duration of the study and precluded the study team's fully addressing all of the issues relevant to the assessment. Nevertheless, the findings presented focus on the priority issues relevant to the system's operation, identified consistently in the course of the study team's work, and should provide a framework for addressing other issues the Commission may wish to pursue.

Although the CCTAP study has focused on the operations of the OPD *system* – and not on the services being provided – we would be remiss if we did not note the high regard expressed for the OPD attorneys by the justice system officials with whom the study team met as well as their commitment to providing high quality defense services that was evident in all of our contacts.

B. STUDY METHODOLOGY AND SITE SCHEDULE

1. Problem Definition Phase: First Site Visit

In August 2008, a preliminary visit to Helena was conducted by Ms. Cooper, Mr. Trotter, Judge Singer and Mr. Hartman to obtain preliminary background on the operations of the program, identify the personnel inside and outside of the Agency who should be interviewed, and develop preliminarily a plan for conducting the study. The team met with Randi Hood, the Chief Public Defender for the state, Ms. Tara Veazey, the incoming Chairman of the Board of Commissioners, Harry Freebourne, the Administrative Director for the OPD, others involved with the program, and, in addition, conducted a telephone conference call with Mr. Taylor, the former chairman of the Board, who was leaving shortly for a sabbatical in China.

During this meeting, Chief Defender Randi Hood and her staff provided information regarding the history of indigent services in Montana prior to the establishment of the statewide program, which was very helpful to the team. Chief Hood's staff also tendered to the team minutes of all the Commission meetings from the outset of the program. In addition, Chief Hood explained the organization of the OPD, discussed the framework developed for its operation, described JUSTWARE, the OPD information system, and provided other materials to the team relating to the requirements for annual evaluations, training, and included a list of the staff. These materials were reviewed by the study team and were invaluable in helping the team understand the issues and the role of the Commission, supervisory staff of the OPD, etc.

As noted earlier, although the Technical Assistance request had specified visiting all eleven regional offices, it was determined that, in view of the limited resources available to the

CCTAP Project, the study team would select for study representative offices—Billings, Butte, Helena, and Missoula -- coupled with attendance at the statewide public defender training conference in Billings in October where study team representatives could meet with defenders and contract attorneys from throughout the state. It was agreed that Ms. Hood would serve as the local coordinator for alerting the regional offices to the CCTAP study visit and the attendees at the October conference so that the CCTAP representative could meet with as many OPD attorneys from around the state as possible even though a site visit to their respective area might not be feasible.

It should be noted that the records the Agency provided, both during the August visit and subsequently, did not allow the study team to assess with any objectivity such items as (1) time of entry of the public defender attorney into cases; (2) adequacy of indigency screening; (3) levels of caseload per lawyer, or their appropriateness; or (4) other systemic issues relating to representation of clients. Accordingly, the team's assessment has been necessarily limited to issues relating to administration, supervision, and the adequacy and deficiencies of operational information and reporting for budget, management and planning purposes.

2. Second Site Visit: October Training Conference and Billings Regional Office

The study team's second site visit, conducted by Judge Singer and Mr. Hennings, took place in October 2008 and focused on a site visit to the Billings office and attendance at the statewide training conference. During the visit to Billings, they interviewed contract lawyers, staff lawyers, a regional director, and a member of the Judiciary. Mr. Hennings then attended the statewide training seminar sponsored by the OPD and spoke with as many attending attorneys as he could locate.

3. Third Site Visit: January 2009 Visits to Butte, Helena, Great Falls and Missoula

The third site visit was conducted in January 2009 by Judge Singer, Mr. Hennings, Mr. Trotter and Ms. Cooper in January, 2009. During this site visit, the team visited the regional offices in Butte, Helena, Great Falls, and Missoula. Judge Singer also conducted a mini-docket study, with the assistance of Heather Smith of the CCTAP staff, for the purpose of analyzing the timeframe and disposition methods for a selected sample of OPD cases.

4. Email/Telephone Survey and Communication

In an effort to reach as many attorneys and others involved with the new statewide public defender system as possible, in November 2008, Jim Taylor sent a notice to the listserve of criminal defense attorneys in Montana regarding the CCTAP study and inviting those interested in talking with the study team to contact the CCTAP. Over 35 individuals responded, representing current public defender attorney and administrative staff, contract attorneys, a former member of the public defender commission, and others from across the

state. Almost all of these individuals requested that their responses be confidential. The study team followed up with all of these individuals, with Mr. Hartman contacting approximately 25 by phone and other study team members talking either by phone or in person with the others. The discussions with these individuals provided an invaluable insight into the challenges the office was facing and, although the perspectives of each of the individuals differed, certain common issues emerged, ranging from administrative problems to personnel management to salary issues to legal issues, including handling of conflict of interest situations.

In addition, conference calls were conducted with other key actors involved with the public defender system, including current and former legislators on relevant committees. All study team members participated on these calls.

5. Compilation and Review of Relevant Background and Supporting Materials

In conjunction with the site visits and field communications, the study team attempted to assemble all relevant background materials that could provide a context for the technical assistance study. These included:

- materials relating to the drafting of the Public Defender Statute, including legislative hearings, the precipitating ACLU litigation materials, and the statute itself;
- materials relating to the Commission's work, including all meeting minutes since its creation, and various standards and other policies developed;
- materials relating to the operation of the OPD, including available documentation regarding office policies, procedures, and related information;
- available management reports and information relating to key elements of OPD operations and attorney performance;
- available personnel management documents, including job descriptions, organizational charts, evaluation protocols; and
- documentation relating to OPD operations, resource needs, budget requests and related information that the OPD had prepared

C. PRINCIPAL ISSUES TO BE ADDRESSED IN THIS REPORT

Starting with the initial areas of inquiry presented in Mr. Taylor's request and the issues raised during the course of the communications described above, the following issues emerged with such continuing frequency as to frame the principal focus of the study team's review. Many of these are interrelated, highlighting the need for adequate information on the services OPD is providing and a management structure for the OPD that provides for meaningful evaluation of attorney performance and promotes their professional development, greater delegation of management authority to the regional offices under the overall supervision of the Chief Defender, and improved mechanisms for communication among all involved with the OPD program to promote both

constructive dialogue as well as the opportunity to air concerns without fear of retribution.

- *Annual Staff Evaluations:*

[The Board has mandated annual evaluations for all staff. Has the management of the OPD evaluated each lawyer and other staff member to date? If not, why not? The present system also requires participation in the annual evaluation by the Chief Defender herself, in addition to the Regional Director, or managing lawyer for each regional office. Can the Public Defender realistically evaluate each lawyer annually, or should this requirement be changed to allow her to delegate these evaluations to other managerial staff?]

- *Caseloads for individual lawyers*, including a method of collecting data to ensure that no individual lawyer in the system is representing more than he or she can handle effectively.

- *Conflicts of Interest:*

[How is the OPD handling representation of multiple defendants? Does the current process whereby a lawyer from one regional office represents one defendant while a lawyer from another office represents a co-defendant satisfy the avoidance of conflict of interest requirement?]

- *Disparity of pay among lawyers* within the same office and throughout the system.

- *Disparity of resources among regional offices based on their caseloads*

- *Dispositional Data:*

[A computerized information system called JUSTWARE is currently in use. Are assistant public defenders or contract lawyers providing the dispositional data necessary to update the system? Although the Public Defender administration appears to keep track of cases assigned to each lawyer, are the lawyers also supplying dispositional data so that it can be determined when cases are closed?]

- *Nature of supervision provided to lawyers*

- *Nature and quality of training and other orientation* provided to public defender staff and contract attorneys

- *Office Morale*

- *OPD's Compliance with Standards adopted by the Board*¹

¹ As one of its initial planning tasks, the Board had adopted the *Ten Principles of a Public Defender System* approved by the American Bar Association as well as additional internal standards relating to representation, services, and staff training.

- *Point in the case process at which the OPD enters its appearance.*²

[It was reported in Cascade County, for example, that assistant public defenders were not representing defendants at the initial appearance. Is this problem being corrected?]

This is not to say that a number of additional issues also surfaced -- such as compliance with Indigency Standards; Fee collections from clients who utilized lawyers from the OPD; and services to juvenile defendants. However, in light of the limited resources available for this assessment, and the limited information currently available from the OPD to address these issues, the study team has necessarily focused its attention on the issues of most common concern. Hopefully, the findings and recommendations presented in the following sections of this report can be useful in addressing these and other issues which the Commission may want to pursue.

² The U.S. Supreme Court's decision in *Rothgery v. Gillespie County, Tex.*, 554 U.S. ____ (2008) expanded the responsibility of public defense services by clarifying any ambiguity that may have previously existed in restating the Constitutional imperative that the right to counsel attaches following a defendant's initial appearance before a judicial officer where he/she learns of the charge against him/her and does not require formal prosecutorial involvement. Any public defense systems that were withholding services until a later point in the criminal process now need to be able to provide counsel as this earlier stage.

II. ANALYSIS OF EXISTING SITUATION

A. SUMMARY OBSERVATIONS

The Montana Defender Agency (OPD) opened its doors for business on July 1, 2006. The Agency had staff, however, as of January 1, 2006, for the purpose of planning and preparation. Of course, much startup work was essential because the 2005 Montana Defender Act was a radical departure from Montana's prior county trial court based delivery system for legal services to persons unable to afford to hire their own lawyer. Other particular startup problems included the inadequacy of the previous system of legal services, which made accurate cost predictions impossible, and the fact that the 2005 legislation covered a substantially larger category of litigation than that usually serviced by organized defender offices or the previous county based system, including family law and competency determination, and status law.³

To the credit of the Commission and staff, a good deal of effort went into the startup process and, in many respects the Agency's overall subsequent performance has substantially benefited the people of Montana. The Commission certainly cannot be faulted for a lack of effort. It produced essential work products, including standards and policy statements, in its effort to guide and supervise the new agency.

On the other hand, it would be expected that some mistakes would be made because of inexperience with the range of issues that emerged in regard to the management of a statewide public defender system and the lack of pre 2006 reliable data. Nevertheless, some mistakes were made that could have been avoided. During the course of our review, we frequently read and heard the statement that the Montana system is so novel that there is nothing like it in the nation. That simply is not the case. Of course, each state is unique with its own characteristics. But state funding and state public defenders have existed in several states for years before Montana's 2005 legislation.⁴ It is unfortunate that the experience of at least some of the many existing state defender programs were not explored during the planning process.

In light of the limited resources available for this technical assistance study, the nature of our effort has necessarily focused on the deficiencies that became apparent in our review. The danger arises, however, that we ignore the strengths. There are admirable qualities in the program. Not necessarily in any order, these qualities include: a supervision commission that is designed to insulate staff from judicial and political interference; a state

³ E.g., a variety of situations where a petition is filed in court to change the status of a person alleged to be mentally or physically incompetent or a juvenile;

⁴ Statewide defender agencies have existed in various forms for some time. A 1999 survey by the Bureau of Justice identified 21 states where funding of defense services for indigents was by the state. In 19 of those states, public defender offices were state agencies. Although the Montana conflict attorney supervisor retained in the summer of 2006 appeared to be aware of other state defender programs since he indicated he had communicated with at least three, it does not appear that other defender agency leaders were in contact with other state defender offices.

funding system; and a system that utilizes an organized defender staff and substantial numbers in the private bar. The framework for the system provides for an efficient hierarchical structure, if adequately funded and staffed. It would reap the benefits of state financing and supervision, yet allow flexibility to satisfy the needs of different localities. Not the least of the accomplishments are the standards that have been developed to guide and direct the staff to provide effective and efficient service. Those accomplishments are indeed commendable.

Nevertheless, three years after the program's initiation, there are fundamental problems that must be addressed. That fact has been recognized.⁵ Unfortunately, a year after that memorandum was sent, we see the same problems and issues as well as additional problems. These problems include: failure to implement a system of caseload control, an inability to evaluate the effectiveness of the staff and contract lawyers, and an inability to accurately and promptly track case dispositions and fully describe the work of the Agency.

These failures have caused internal as well as external problems. Externally, the Agency has not been able to document its value to the state and this inability puts in jeopardy the likelihood of receiving adequate funding. Internally, much of the staff has low morale. Many staff members believe they are not treated fairly, and there is turnover of experienced staff. Experienced contract lawyers who are essential to the Agency have indicated they will decline to accept more than a few assignments and some have indicated that they may not participate at all in the future. The Commission is unable to determine if its standards and policies have been implemented and are unable to properly fulfill their function of effectively supervising the Agency. Accurate budget projections are impossible; planning for emergencies and case overload is non-existent, and staff supervision is not performed.

The defender function is not popular with the public. In the best of times a defender agency has a very difficult time competing with other state agencies for funding. These are not the best of times. To date, it appears that the state Defender Agency could do far more in terms of selling itself as a valuable organization making a significant contribution to the community generally and the justice system in particular and in supporting its funding requests. It is important to note that the OPD, staff and Commission are to be commended for implementing the staffing capability, policies and procedures to get the Agency up and running. An enormous amount of thought and energy went into getting the system developed thus far. This report attempts to address the problems that have emerged, with the goal of improving the OPD system and the public's understanding of the office's functioning and operations.

B. LEGISLATION CREATING THE PRESENT STATE DEFENDER SYSTEM

1. Situation Prior to the OPD Legislation

⁵ See Appendix A. Memorandum from Commissioner Dan Donovan, April 15, 2008, to the Commission, the Chief Defender and staff.

Immediately prior to the present legislation creating the state defender agency, each county in Montana had the responsibility to provide for trial court representation of criminally charged indigent persons. The county provided the primary funding for its chosen system, with the state reimbursing the counties for providing representation in district courts. The counties of Missoula, Yellowstone, Bozeman, Anaconda-Deer Lodge, Cascade, and Lewis and Clark had organized defender offices. Dawson County had a one lawyer defender office. A state funded appellate office for indigent criminal appeals was located in Helena, where the state's only appellate court, the State Supreme Court, is located. The appellate office in Helena served the entire state.

2. 2005 Legislation: Principal Provisions

The 2005 legislation creating the present statewide defender agency directed that the existing appellate defender office and the existing county defender trial offices be absorbed by the state defender agency.⁶ Previously, the appellate office had its own supervisory commission, but that commission was disbanded, and supervision was transferred to the new state defender agency as of July 1, 2006, the date the legislation directed that the defender agency become totally operative.

The present legislation requires the state agency to provide indigent defense services in all trial courts, which include Justice of the Peace, City and District courts, as well as for appeals to the state Supreme Court. In addition to misdemeanor and felony criminal cases in which the Agency is appointed, public defender agency attorneys or private attorneys retained by the Defender Agency (frequently referred to as "K attorneys" and referenced in this report as contract attorneys) are to provide representation for persons who are unable to afford to retain their own lawyer in the following cases:

- (1) For proceedings to determine parentage of a child
- (2) For a parent or guardian in any "removal, placement or termination proceeding or involuntary commitment of a child"
- (3) For persons who are respondents in an involuntary commitment proceeding
- (4) For a witness in a grand jury proceeding
- (5) For a minor who petitions for a waiver of parental notification under the state's abortion act
- (6) For a variety of situations where a petition is filed in court to change the status of a person alleged to be mentally or physically incompetent or a juvenile; and
- (7) For juveniles charged in delinquency petitions

⁶ There are a number of Native American reservations in Montana with their own tribal courts. Those tribal courts, as well as federal courts, are not part of the state court system and are not included in the present state legislation regarding public defender services. They are therefore not included in this study.

The Office of Public Defender is also to provide representation when appointed in state appeals of sentences and convictions as well as state post conviction proceedings. The statute is silent regarding certiorari to the United States Supreme Court and collateral attack of state court convictions in federal court. The legislation authorizes the defender agency to use its discretion in assigning cases to a staff lawyer or contract lawyers.

An eleven-person commission supervises the entire system for the delivery of legal services under the 2005 legislation. Commission members are to be appointed by the governor but from nominations provided as follows:

- Two attorneys nominated by the Supreme Court
- Three attorneys nominated by the President of the State Bar Association
- One person nominated by the president of the state senate
- One person nominated by the speaker of the state house of representatives

The remaining four members are to be selected by the state's governor at his/her discretion, except that two persons are to be non-attorneys. Other attributes of commission members to be considered in the governor's selection include persons who have been advocates for indigent persons and racial minorities; employees of organizations providing counseling for addictive persons, and persons experienced in criminal defense and the work of public defenders.

The statute authorizes the state to be divided into as many as eleven regions, with a defender office in each region. A regional director for each region is to be appointed by the Chief Public Defender, and staffing of the region is at the discretion of the Commission, subject to the authorized budget. The Agency is authorized to provide services either through a defender office or by contracting with lawyers in private practice or any combination of staff and contract attorneys.

Specific staff positions are provided for in the legislation as follows:

- (1) The Chief Public Defender, who must be an attorney, to be hired by and to serve at the will of the Commission. That person is authorized to hire the remainder of the OPD staff.

In addition to the director, the following defender staff members are specifically designated in the legislation:

- (2) A chief appellate defender
- (3) A chief contract manager to supervise contract attorneys
- (4) A training coordinator for staff and contract lawyers
- (5) A deputy public defender for each designated region
- (6) An administrative director experienced in business and contract management for the entire Agency

All of the above positions are designated as exempt provisions from the state's general compensation schedule. Additional attorney and support staff are to be hired by the Agency director consistent with budgetary limitations.

Other provisions of the statute that are noteworthy included a time table directing the immediate appointment of the commission and the implementation of the OPD system. The commission was to appoint the state public defender by January 1, 2006, and the Agency was to begin operation on July 1, 2006. The headquarters office was directed to be in Butte, Montana; the appellate defender office is required to be located in Helena, Montana, the state capital and the location of the Supreme Court, which, as previously noted, is the state's only appellate court.

As to the contract attorneys, it is noteworthy that the legislation provides that their compensation may not be a fixed amount, "irrespective of the number of cases assigned," nor are contracts to be awarded, "based solely on the lowest bid." There is no legislative mandated hourly rate nor any fee to be paid for representation of a client. The statute also authorizes the defender staff to make the determination for eligibility for appointment of counsel by the trial court "subject to the review and approval of the court."

Aside from the general supervision of the Defender Agency, the 2005 Montana Defender Act requires the Commission to:

- (1) Appoint the chief defender and establish qualifications, duties, compensation and periodically evaluate the chief defender
- (2) Establish statewide standards and qualifications for the appointment of attorneys
- (3) Approve and review periodically the number of staff positions for the Agency
- (4) Define conflict of interest situations and establish procedures to ensure that conflict of interest situations are resolved consistent with law and ethics
- (5) Establish standards to include:
 - (a) Case and workload limits for Agency lawyers and protocols to assure that workloads are manageable
 - (b) Provisions to ensure that staff have the training and experience necessary to handle the various kinds of cases staff and contract lawyers are assigned
 - (c) Provisions to ensure that lawyers have access to necessary supporting resources and non-lawyer staff
 - (d) Establishment of practice performance criteria
 - (e) Review and approval of strategic plans, proposals, budget and staff positions
 - (f) Establishing policies and procedures for handling excessive caseloads
 - (g) Assurances that expenditure and caseload data are collected and reported
 - (h) Submission of a biennial report to the governor, Supreme Court and both houses of the Legislature

In subsequent sections of this report, other provisions in the statute will be referenced as they may apply to specific areas being addressed.

C. STAFFING

The following is a summary of the Defender Agency staff by region, with a separate listing of staff at the headquarters office and appellate office. This summary does not include the contract lawyers. Positions are divided among the following categories as indicated in the documents provided to the study team by the OPD:

(1) *Attorneys*, which are grouped without any designation as to those who are directors, managers, or supervisors. The attorneys listed therefore include all levels of supervising lawyers, e.g. Chief Public Defender and Contract Manager, both of whom are lawyers and Regional Deputy Public Defenders (one for each of the 11 regions), and the managing attorneys in each regional office). The Appellate Office has six lawyers including the Appellate Defender.

(2) *Nonlawyer positions*. Non lawyer positions in the regional offices are divided into the following categories: administrative, investigators, paralegals and secretaries. Although secretarial positions are designated in two categories: "legal secretary" and "secretary", the following breakdown the study team was provided does not distinguish the category of secretary in the offices listed. Nonlawyer positions in the appellate office consist of a paralegal, a legal secretary and a secretary at 0.5. Non lawyer positions in the headquarters office consist of the Administrative Director and his staff of 10 people.

For this staffing description we have relied upon:

- (1) an "organizational chart," dated "March 6, 2009," provided by the OPD which only provides a partial line of authority. We assume that this chart was drafted in response to the study team's request for a chart showing staffing and lines of authority; and
- (2) a map provided to the study team which defines the 11 regions, and the courts and counties in each district, with staffing information (as well as information regarding cases "opened" during fiscal year, July 1, 2007, to June 30, 2008, among other information.)

CHART: OPD STAFF BY OFFICE AND NUMBER OF CASES OPENED: JULY 1, 2007 – JUNE 30, 2008		
<u>OFFICE AND STAFF</u>	<u>TRIAL COURT CASES OPENED 7-1-07 TO 6-30-08⁷</u>	<u>NUMBER IN EACH POSITION</u>

⁷ The case count does not include cases carried over from the previous year, nor are cases designated in terms of type or kind of case.

CHART: OPD STAFF BY OFFICE AND NUMBER OF CASES OPENED: JULY 1, 2007 – JUNE 30, 2008		
<u>OFFICE AND STAFF</u>	<u>TRIAL COURT CASES OPENED 7-1-07 TO 6-30-08⁷</u>	<u>NUMBER IN EACH POSITION</u>
Headquarters (Butte)	0	
- Lawyers		4
- Administrative Staff ⁸		14
- Secretaries		0
- Investigators		0
- Paralegals		0
Appellate Office (Helena)	N/A	
- Lawyers (includes Chief App Def.)		7
- Administrative Staff		1.5
- Secretaries		0
- Investigators		1
- Paralegals		0
Region 1 (Kalispell/Polson)	3,988	
- Lawyers		15*
- Administrative Staff		1
- Secretaries		6
- Investigators		2
- Paralegals		0
		*map lists 16 lawyers
Region 2 (Missoula/ Hamilton)	4,596	
- Lawyers		23
- Administrative Staff		3
- Secretaries		6
- Investigators		2
- Paralegals		0
Region 3 (Great Falls)	2,164	
- Lawyers		12
- Administrative Staff		2
- Secretaries		3
- Investigators		3*
- Paralegals		1
		*map lists 4 investigators
Region 4 (Helena)	2,733	
- Lawyers		9.5
- Administrative Staff		1
- Secretaries		2

⁸ Included under “Administrative” in the Headquarters Office are the operations and systems manager, a case management end user support accountant and an accountant tech, a mental health consultant, and a Human Resource officer. However, in the organizational chart dated March 6, 2009, the Mental Health Consultant is shown as under the authority of the Training Coordinator.

CHART: OPD STAFF BY OFFICE AND NUMBER OF CASES OPENED: JULY 1, 2007 – JUNE 30, 2008		
<u>OFFICE AND STAFF</u>	<u>TRIAL COURT CASES OPENED 7-1-07 TO 6-30-08⁷</u>	<u>NUMBER IN EACH POSITION</u>
- Investigators		0*
- Paralegals		0
		*map lists 4 support staff/0 investigators
Region 5 (Butte/Anaconda)	1,611	
- Lawyers		9
- Administrative Staff		1
- Secretaries		1
- Investigators		2
- Paralegals		2
Region 6 (Havre)	1,058	
- Lawyers		1*
- Administrative Staff		1
- Secretaries		1
- Investigators		0
- Paralegals		0
		*map lists 2 attorneys
Region 7 (Lewistown)	472	
- Lawyers		1
- Administrative Staff		1
- Secretaries		.5
- Investigators		0
- Paralegals		0
Region 8 (Bozeman)	1,960	
- Lawyers		10
- Administrative Staff		2
- Secretaries		3.5
- Investigators		2
- Paralegals		0
Region 9 (Billings)	6,808	
- Lawyers		16
- Administrative Staff		1
- Secretaries		6.5
- Investigators		3
- Paralegals		0
Region 10 (Glendive)	464	
- Lawyers		2
- Administrative Staff		0
- Secretaries		1
- Investigators		0

CHART: OPD STAFF BY OFFICE AND NUMBER OF CASES OPENED: JULY 1, 2007 – JUNE 30, 2008		
<u>OFFICE AND STAFF</u>	<u>TRIAL COURT CASES OPENED 7-1-07 TO 6-30-08⁷</u>	<u>NUMBER IN EACH POSITION</u>
- Paralegals		0
Region 11(Miles City)	704	
- Lawyers		2
- Administrative Staff		1
- Secretaries		0
- Investigators		1
- Paralegals		0

Note: Not listed on the Chart is the Training Coordinator. He is a lawyer, has a “roving” assistant public defender and the Mental Health Consultant working under his authority. He has no secretary.

III. OBSERVATIONS AND FINDINGS

A. MANAGEMENT OF THE OPD SYSTEM

1. Summary Observations

The State Defender Agency structure was, to a considerable extent, laid out in the 2005 enabling legislation and was enacted, in part, to address serious allegations of major deficiencies in the delivery of legal services to indigent persons, including violations of federal and state constitutional and statutory requirements. The legislation illustrates a serious commitment to improve indigent defense services through the state.

The governing commission established by the legislation labored long and diligently at the outset, and its accomplishments were considerable and commendable. If their funding standards and policy were implemented, an excellent program would emerge. The initial implementation efforts by staff also reflected a great deal of effort, and there is much to be admired in what was accomplished by the Commission and staff. The legislation does, however, in great part, leave it to the Commission and staff to develop management policies and procedures for implementing the structural design for the defender program on an operational level. This is a task which still requires substantial attention.

Although we believe that the management of the Montana system has deficiencies, further described below, we were struck by some examples of very good management elements. The operational elements of the new system – the establishment of the Commission and its operation; the Commission's creation of a model set of practice standards for public defender attorneys; an excellent statewide training program; the creation of forms necessary for hiring and assigning staff; mechanisms for paying bills and the establishment of a central office have taken place.

Nevertheless, the deficiencies are major and failure to cure them puts the organization in peril.

Summarily, the management problems we observed were as follow:

- (1) There is an inadequate number of administrative and supervisory personnel to support the Agency's operations, as they currently are designed;
- (2) The supervisory staff attorneys carry heavy caseloads and represent too many clients; hence, there is, in fact, little, if any, supervision of contract and staff lawyers.
- (3) The Agency information system is woefully inadequate, and contributes to management and communication inadequacies. In addition, defender staff do not know how to enter and extract relevant information from the computer.
- (4) The Chief Defender does not appear inclined to delegate responsibility to lower level supervisors.

- (5) There is virtually no planning for various contingencies or for the future budget. While budgets are prepared and submitted, they are done so ad hoc and not adequately justified.
- (6) There is too little meaningful communication among OPD management with staff.

The results of these shortcomings are:

- (1) Attorney caseloads are not monitored and controlled.
- (2) There is poor morale among many of the staff and contract lawyers, and attorney turnover is relatively high.
- (3) Budgetary projections are likely to be too low and funding inadequate because there is no accurate and comprehensive information upon which they can be based;
- (4) The defender agency is not equipped for emergencies which may require sharply increased defender services or case overload; and
- (5) It is impossible to determine if Commission standards are adhered to and Commission policy is being implemented.

2. Major Management Deficiencies Noted

Daily management requires an ongoing dedication to creating and using tools to enable staff to provide the best services possible. It includes teaching, mentoring and the enabling of staff. It includes vision and forethought to avoid problems rather than only to react. It requires honest and timely evaluations to encourage good performance and to allow weaker staff to improve. In a professional public defender setting it requires management to create a place to grow, perform and represent clients. It requires a team that has an *esprit d corps*, rather than workers in fear.

Among the most serious management deficiencies noted are the following:

a. *Lack of Meaningful Job Descriptions*

The study team repeatedly requested job descriptions and organization charts in order to review who did what in the organization and who reported to who. We finally received some job descriptions which did not include all of the Central Office jobs and were not generally helpful to determining what was expected of the person, nor would they be useful in evaluating the person's work. Many employees were also not aware of any job descriptions for their positions so that, for practical purposes, the job descriptions are useless. This situation presents a lack of clarity in terms of what is required of employees, a situation that contravenes the clarity of the excellent standards of practice adopted by the Commission.

b. *Lack of Detailed Description of Organizational Structure*

The team requested an organization chart showing every position (including contract attorneys), where they worked and the command structure, e.g., who they reported to.

After repeated requests we received numbers by region, but no organizational chart indicating a reporting structure. Even the numbers provided appeared to leave out important positions. As a result it is impossible for the study team to determine whether a valid management structure and system exists and whether it is operating as expected. Without the foundation of such a clearly delineated organizational structure, adequate management oversight and planning would seem impossible. The result of this situation is that many dedicated staff members have a shaky understanding of their place in the system, feeling insecure because, without such an organizational structure, management is perceived to be by whim.

c. Lack of Annual Staff Evaluations

Related to the perceived inequities in salaries noted elsewhere in this report is the fact that annual and meaningful evaluations for both staff and contract attorneys have not been conducted. Although the enabling Defender statute and the Commission have mandated such evaluations (Policies 135, 515), and the Chief Defender has pledged to do them, in fact, they have not taken place. Part of the reason is that the policy of the Chief Defender is that she is required to be involved in each evaluation. Given her other responsibilities, not the least of which includes caseload of serious offenses -- including at least one murder case -- which she has taken on, it is simply impossible to accomplish this task. A possible solution is for her to delegate responsibility for conducting the evaluations to the Regional Directors or to hire an assistant in her supervisory staff to concentrate on designing and implementing such an annual evaluation program for all staff. Of additional import is the need for meaningful job descriptions -- which appear to be missing -- and which can serve as a tool to guide evaluations of individual staff.

d. Lack of operational and management data

The study team has noted in various sections of this report the serious problems resulting from the lack of essential operational and management data available from staff. Although there is a computerized information system which can be utilized by the Agency, it is not. As has been noted elsewhere in this report, some contract attorneys are not even aware of the information system let alone the requirement to enter information into it. And even those attorneys, who do enter information, are not providing the essential intake and dispositional data needed to manage the system and plan for its needs. The system also does not track the assignment of open cases or when these are closed and, as has been noted elsewhere, record the type of case, the method for closing it and the sentence imposed. This lack of data has already been criticized by legislative committees and seriously undermines the Agency's case to justify its budget needs and seriously undermines the Agency's credibility.

Management is a full time job. The Commission should approve a strategic plan for the next year that will, among other things, require that measurable improvements be made in the ongoing management of the Montana Public Defender System and the role of the Chief Defender in the overall management of the system. In many respects, the standards and policies adopted by the Commission are exemplary. But those exemplary standards

and policies are of no value if they are not implemented. Indeed, it is unfair and harmful to give promises and raise expectations through the promulgation of policies and standards, but then fail to implement them.

3. Need for Information for Managing and Monitoring OPD Operations

As already noted, the Defender Commission produced a relatively detailed and inclusive set of client representation standards and implementation administrative policies. These standards and policies are impressive. However, although the Defender Agency has been in operation three years, there is no statistical data readily available to assure that the standards have been implemented, nor is there sufficient information compiled on a regular basis to allow supervisory staff to effectively supervise staff and contract lawyers, to control caseloads and/or to assess quality of service. There is also no adequate information produced to properly make budget projections and support budget requests to the Legislature.

This situation is reflected in the voluminous “Report to the Governor, Supreme Court and Legislature, October, 2008” which contains several pages of statistics reporting numbers and kinds of cases coming into the Agency, a section illustrating a “caseload management tool” and a budget narrative submitted in addition to the report. Incredibly, there is nothing in any of the materials given to the Legislature about dispositions of cases handled, present caseloads or how cases were closed, and/or the sentencing results in these closed cases.

This lack of case dispositional information was noted by the chair of the Montana Legislative Joint Appropriations Subcommittee, who requested disposition information. The Defender Administrative Director reported in a letter February 5, 2009 some dispositional information for fiscal years 2007 and 2008 but indicated that the total dispositions for those years could not be determined. Even for those cases for which dispositional information is provided, no breakdown is given as to the type of case involved (e.g. misdemeanor, felony, capital cases, juvenile custody, mental health, etc.) and no information is provided for cases disposed of by contract lawyers. For purposes of assessing compliance with standards and quality of service, as well as for caseload control and budgeting, the report therefore has no use. Moreover, the failure to report on contract lawyer dispositions seriously understates the work of the Agency. In many counties, the bulk of defender work is completed by contract lawyers. Without providing this information, the Legislature cannot be faulted if the defenders are seriously underfunded for the new biennium.

While the Agency may blame under funding on the state Legislature, the study has consistently found that the Agency has not adequately documented its budget submission by informing the Legislature of the nature of its caseload and accomplishments, nor made reliable projections of future caseloads, both in terms of numbers and workload entailed, premised upon the Agency’s history of case intake and dispositions. The lack of complete information about the nature of services provided in handling the cases filed

and their final dispositions is probably the most serious problem confronting the Defender Office.

4. Supervision and Supervisory Structure

For the fiscal year ending June 30, 2008, the OPD attorney complement consisted of 112 staff attorneys, including supervisory attorneys and six lawyers assigned to the appellate division; and 222 additional contract attorneys. The Contracts Supervisor is an attorney and was included in the staff attorney count.

Based upon the “organization chart” dated March 6, 2009 provided by the OPD, the supervisory structure for the OPD is as follows:

Chief Public Defender
Chief Appellate Defender
11 Regional Deputy Defenders (one for each region), and 10 Managing Attorneys distributed as follows:
2 Managing Attorneys each for Regions 1, 2, 5
1 Managing Attorney each for Regions 3, 4, 8, 9

There are no Managing Attorneys designated for Regions 6, 7, 10, and 11

Region 9 also has a “supervisor” attorney for “lower courts.” This position is probably a carry over from the period prior to the 2005 Defender Legislation.

The Headquarters Division and Contract Lawyers Division do not have any supervisory attorney positions assigned; they all work under the Chief of the Division. There is also an Administrative Director who is not a lawyer and who has a staff of 10 people.

Despite the supervisory structure on paper described above, little, if any, supervision or evaluation of attorneys or other staff performance actually occurs. Although we were provided with a relatively detailed evaluation protocol dated November 25, 2008, and a “Performance Appraisal” form for contract and staff attorneys dated March 18, 2009, none of the staff or contract attorneys with whom we spoke indicated they had ever been formally evaluated, let alone evaluated in accordance with the protocol⁹

The failure to supervise and evaluate staff and contract attorneys appears to be due to a number of factors:

- (1) the heavy caseloads supervisor attorneys carrying;

While the Defender Legislation requires supervisors to carry a “minimum” number of cases, the legislation does not require them to carry the heavy

⁹ As noted, the Performance Approval Scale is not consistent with the Rating Scale (p.5) of the Protocol.

caseloads that supervisors, including the Chief Defender and Contract Supervisor, actually carry. The Agency must decide to either reduce attorney management caseloads to a “minimum” or retain more supervisors.

- (2) the fact that the Chief Defender has not yet appeared to make the evaluation function a priority due, perhaps, to the serious caseload she also carries.¹⁰
- (3) the fact that there are too many contract lawyers and distances to travel to evaluate the contract lawyers according to the protocol.

Another factor that may be relevant is the apparent reluctance of the Chief Defender to delegate authority. Considering the geographic size, climate and topography of the state, it is physically impossible for the Chief Defender to personally supervise every office and aspect of the defense function without considerable delegation of authority. The structure authorized by the 2005 Defender Legislation appears to contemplate considerable delegation of authority to the Regions and the Contract Manager. While the legislation places ultimate responsibility in the Chief Defender, it does not prohibit – in fact it encourages -- the delegation of authority to Regional Directors. The primary evaluation function for contract lawyers to determine inclusion and exclusion, classification and assignment of cases should be delegated to the Contract Manager and the Regional Deputy Directors. Considering the distances between the Butte headquarters office where the Chief Defender and Contract Manager are located and the other regional offices in the state, the need to delegate is essential.

5. Special Issues Relating To Supervision/Evaluation of Contract Lawyers and Fee Payments

a. *Supervision and Case Monitoring*

Since much of Montana is sparsely populated, there are few, if any, large or midsized law firms. Lawyers are usually in solo private practice or sometimes with a few associates. In the Eastern portion of the state, the population is particularly sparse, and we were advised that it was particularly difficult to attract lawyers to that area. The Defender Agency therefore relies primarily on contract lawyers for indigent representation. Even in a more populated county with a staff office, sparsely populated counties distant from the staff offices but still within the Region may be better served by contract lawyers who have offices within those distant counties.

¹⁰ The Chief Defender’s caseload, while perhaps not large in numbers, involves more serious charges. She is qualified under Montana Supreme Court rules to represent clients charged with capital murder and may be the only one that is qualified to provide capital representation. At the time of the study team’s visit, she was representing a defendant in a capital murder case.

Given the considerable role contract attorneys play in the indigent defense services delivery structure in Montana, the lack of supervision, quality assessments, and inadequate case monitoring of contract lawyers requires prompt attention.

b. Hourly Rates and Fee Reductions

Morale is also low among some contract lawyers because of what many perceive to be an inadequate fee schedule and what appears to contract lawyers to be arbitrary reduction of billed time. There was also evidence that highly regarded lawyers are discouraged from taking cases.

There is also a perception that the \$60.00 per hour payment rate is too low for experienced lawyers although that rate may be acceptable to a lawyer initiating a private practice or with a marginal private practice. An example was offered of a former staff lawyer who was unhappy as a staff defender and encouraged to leave the office with the assurance that, because the office was understaffed, she could take the 150 cases assigned to her as a staff attorney to work on as a contract attorney once she started her new practice, with a guaranteed payment at the \$60.00 hourly rate. A highly regarded lawyer who had an established practice said that the \$60.00 per hour rate did not even cover overhead expenses. He said his normal hourly rate was \$150.00 per hour, but he usually charged a flat rate in criminal matters; his example was \$7,000.00 for a vehicle homicide case. He had taken a few contract appointments, but was not doing so now. It is unfortunate that the lawyer is no longer accepting appointments but his situation is an indication of how the current rate discourages experienced lawyers from accepting contract cases although it may attract less experienced and, potentially, less successful lawyers.

The situation is, of course, not clear cut and we understand that the Regional Director found the transfer of open cases to the departing lawyer in the situation cited above cost effective because that lawyer had knowledge of the cases and the attorney-client relationship was established. In addition, there was no replacement lawyer on staff to assume those cases. Hiring replacement lawyers is slow because, reportedly, the Chief Defender requires her involvement in the interview of all candidates.

The problem of the low hourly rate is exacerbated because lawyers are paid \$110.00 per hour in federal court appointments. Obviously a lawyer would take a federal appointment over a state appointment and would be inclined to give more attention to federal cases. In the OPD reports to the Governor, Legislature and Supreme Court, and in budget submissions, we did not note any request to enlarge appropriations for contract lawyers or statistics regarding their workload and case dispositions that might support the need and value of contract lawyers.

The failure to compile and report statistical information regarding the work of the contract attorneys also weakens the ability of the Contract Manager to exercise supervisory authority.

Unsupported reductions in fees, also a common complaint, contributes to low contract lawyer morale and discourages good lawyers from accepting cases. For example, one former contract lawyer told us he was stricken from the program because he took too many cases to trial rather than convincing clients to plead guilty – a course which would reduce his fees. He believed he took cases to trial only when appropriate and was not shown any objective information that supported the Contract Manager’s reason for excluding him. This lawyer has been vociferous in his complaint and was brought to our attention by other lawyers in the area with whom we spoke. His experience will discourage good aggressive lawyers from taking OPD cases. On the other hand, the marginal attorney who needs the business may turn into a guilty plea machine, taking shortcuts in preparation to avoid being taken off the contract attorney list.

In another example, Commissioners were advised that a fee petition for \$60.00 was rejected because it covered services rendered during a full year rather than billed periodically billed. We were told from other lawyers that the time restrictions for filing fee petitions were often not enforced. Payment of fees was also frequently reported to be late. Without documentation that reliably illustrates that fee petitions are always timely filed and payments timely made, these claims of late payment cannot be refuted may also be a factor discouraging qualified lawyers from participating in the contract attorney program.

B. MANAGEMENT INFORMATION NECESSARY TO ACHIEVE AGENCY OBJECTIVES

Note: In the accompanying footnote, the consultants offer their perceptions about the overall concept of management as it applies to an organization such as a public defender agency, the data needed for effective management, and the uses to which that data should be made.¹¹

1. Type of Data Needed to Manage the OPD System

11

Management entails the mechanics of planning, organizing and energizing a group effort toward a common goal. Management of professionals includes enabling the individuals in the group to put forward their best, self directed, efforts toward achieving the common goal, with the majority of their energy coming from those individuals.

Management Data are sets of observations utilized in order to reduce real world actions into a meaningful set of simple views in order to better understand operations and processes. The data allows the manager to identify problems and opportunities and to plan, measure and to work to alter those operations and processes, as appropriate, to address problems noted.

Management Data do not convey the total reality of what is going on, but serve, rather, as shadows, like those of a shadow play on a wall. If properly designed and used, however, they provide important flags to enable a manager to quickly focus on important areas or problems -- as well as possibilities --, make provisional management decisions, and guide the manager toward further review to determine what is actually going on, e.g. the reality.

The data needed for adequate management of the system must be meaningful, easily collected, easily available to managers and focus on the essential information that is needed to manage the system to ensure that its staff resources are adequately utilized and that it is delivering the quality services required. In order to create a meaningful management information system, a decision must be made as to what information needs to be compiled to assist managers in planning, supervising and directing the operations of the system. The data must be kept simple in order to be useful and in order to be easily collected and analyzed.

The data should be entered at the time the events occur and by the people responsible for the events. The data also should be of assistance to the person entering the data and utilized in his/her work. This closeness in time and person and relevance to their actual work contributes to the integrity of the data. Data created solely for a budget or a presentation is generally not going to be as accurate as data created and used in the actual work during the course of its performance.

Management Data Reports should be used as a guide for reviewing program operations and, where appropriate, as a flag for highlighting areas for further review. For example, a report of trial rates if higher or lower than expected should cause further investigation rather than any preliminary management decision.

Data must be used or it is useless. Managers must know that the data exists, how to use it and actually use it.

2. Essential Management Data Needed for Defender Systems

The data compiled in a defender management information system needs to provide a reflection of the work that has been done. It is tempting to describe *work* as “number of cases” -- and most national standards have been set in case numbers due to the lack of data for a better measure of actual work performed. However, the extent of *work* required for adequate representation in criminal matters differs vastly for different types of cases as do the consequences, the difficulty of investigation and the likelihood of trial. Therefore the management data to be compiled must be carefully designed to capture these differences which allow a manager to make a meaningful analysis of the work being performed and the resources required.

Advanced defender management data systems involve the added complexity of capturing actual work by case weighting systems (which create average relational case weights for all types of cases or charges) or hourly time reporting systems (which captures the time worked on cases)¹². The case weighting systems depend upon a large existing data base

¹² The Defender Commission apparently identified the importance of time records for case activity when in a policy statement it required that attorneys report the time spent on each case activity. However, we did not observe any evidence that this policy statement has been implemented. Nor have we observed any effort by the Commission and the staff to implement this policy.

for their creation and periodic reviews to update the weights to conform with actual practice. The hourly time reporting systems depend upon a large overhead for data entry clerks and data integrity oversight with a significant error rate frequently noted in reporting or recording time. Although hourly reporting is used to validate case weighting systems, it is difficult to use as a direct supervisory tool. In any event, both Case Weighting and Hourly Reporting systems require a mature existing data program upon which they can be developed.

The minimum data set needed must be capable of:

- allowing review of what the workload for the office has been, what it is now and what it will be in the future
- capturing differences by location of the crime, the court involved and the nature of the defendant (juvenile, adult, non native speaker) and his/her custody status, and the case outcome;
- being detailed enough to
 - analyze the work done on closed cases to determine patterns and problems or opportunities for management response;
 - make intelligent estimates of the work that will be needed on pending and assigned cases to appropriately distribute the workload among staff; and
 - to raise flags to allow a manager to further investigate the work of an employee to determine if correction is needed.

Well designed information systems will also have data elements that allow comparison to the data produced by other criminal justice agencies (police, prosecution and courts).

3. Special Issues Relating to Information Needed For the Montana OPD System

The 2005 Montana Defender Legislation established a public agency, funded primarily by the State which requires continuing detailed information regarding the work of the Agency, including case intake and disposition data, for planning and budgeting purposes. Nevertheless, the Agency has not provided this information to the Commission nor even attempted to gather essential case disposition information. The Commission must insist that this information be provided and updated on an ongoing basis. The Chief Defender cannot possibly fairly and competently manage the program without that information. Yet, none of those policies have been complied with as far as we can see.¹³

¹³ The Agency report to the Governor, Legislature and Supreme Court provides information about case intake for Fiscal Year 2008, but no information at all about dispositions. It purports to provide caseload information; however, much of this information are projections and not actual dispositions and is not all inclusive. There is not any information on how the cases were closed. The Commission has promulgated several policy statements regarding “case reporting” (Policy 108), “caseload management” (Policy 117), “time reporting” (Policy 120), determining “proficiency” of contract lawyers (Policy 135), and staff lawyers (Policy 515) among other policy statements.

In a letter to the Chair of the Montana Legislator's Appropriation Subcommittee, dated February 4, 2009, the Administrative Director of the Defender Agency promised, among things, to:

- track the outcome of cases in the future, including the length of time between a case opening and closing; and
- begin and complete evaluation of staff and contract attorneys.

Such information is essential to supervision, planning, budgeting and reporting as well as supporting funding requests to the Legislature. This information is also essential for the Commission's supervision as well as the ability of the Chief Defender to evaluate staff performance and manage the system. The Commission needs to be able to respond regularly to such questions as:

- At what point in the legal process do the contract and staff attorneys begin representation?
- What is the custody status of the clients?
- What case disposition results are being achieved?
- How much substantive pretrial motion practice, e.g. motions to suppress evidence, motions in limine, etc. is the Agency performing?

The Appellate Division of the Defender Agency must provide similar information about the cases it is handling and their outcomes.

4. Current Limitations of Available Caseload and Workload Information for the Montana OPD

During the examination of the Montana Public Defender system, the team reviewed the collection and use of existing management data. A large amount of data appears to be collected in the electronic data base (JUSTWARE) that came from the existing defender system prior to the creation of the State system. It has since been in the process of modification, but used to create limited data for the Commission, the governor and the Legislature. However, line staff and managers either do not know that the system exists or do not use the system as part of their management duties. Thus the system is useless in terms of supporting day to day management needs of the offices.

When the team requested basic management data from offices we contacted, we were told by some managers that it could be obtained, but despite repeated requests, they could not easily come up with simple reports of cases assigned, pending caseloads, or outcomes by individual attorneys. We believe that the immediate availability of such information is basic to the capacity to provide any valid and meaningful oversight of the workload of attorneys.

The State Public Defender Office was able to provide reports that it used for the Commission, the Governor and the Legislature. However, the format of these reports was not specific enough for the study team to make valid workload estimates or any

qualitative review of the services provided on individual cases. For example, there was no data for case activities or outcomes and no time data to evaluate how long cases were open.

C. MANAGEMENT FUNCTIONS WHICH NEED TO BE UNDERTAKEN

In addition to compiling meaningful and current information relating to the work of the OPD agency, as described above, the Agency needs to develop a realistic plan for performing other critical management functions, including the following:

1. Staff Evaluations

According to the map providing regional divisions and staffing, as of Fiscal Year ending June 30, 2008, there were 112 staff attorneys and 222 contract attorneys. Of that total 25 are managing attorneys, which include the following by title:

Chief Defender
Deputy Regional Defenders
Appellate Director
Supervisor attorney,
Contract Director,
Managers in most, but not all Regions, and
Training Coordinator.

In addition to the staff and contract attorneys, all of the management staff also must be evaluated. The Commission is to evaluate the Chief Defender.¹⁴ In addition, the supporting staff must also be evaluated.

How are these evaluations to be done? The same measures by which staff lawyers are evaluated should be applied for evaluation of the contract lawyers who are considerably more difficult to supervise and evaluate since some only occasionally take cases, and they work out of their own offices and cover a vast territory.

As has been noted elsewhere in this report, not only has there been no meaningful evaluation of staff or contract attorneys or other staff, but the documents and procedures that appear to have been developed for such evaluations appear to be impractical to implement for a number of reasons.

First: All of the managers we have observed also have significant other duties, not the least of which includes representation of a substantial number of defender office clients. Even if the managers do not undertake a significant number of cases, they usually take the more serious time consuming cases.

¹⁴ We have not seen any commission evaluations of the Chief Defender.

Second: Current documents provided to the study team regarding the staff evaluation function appear to be impractical for meaningfully conducting evaluations of agency staff and contract attorneys. The study team received two documents: “The Supervisor’s Guide to Performance Appraisal” and “The Employee’s Guide to Performance Appraisal.” Each document is dated, “Revised November 25, 2008.” We also received two “Performance Appraisal” documents, dated March 18, 2009, one for the staff attorneys and the other for contract attorneys; each sheet requires a numerical assessment of various characteristics.

To date, there is no evidence that any formal evaluation has occurred. Moreover, if evaluations are to follow the directions of the “Guides,” and are to be done by the “Chief Defender” et al (see Policies 515, 135), completing the evaluation would be impossible in light of the detail and extent of information required.

What is also immediately obvious is that the March 18, 2009, rating schedule is not consistent with the rating schedules described in the manual. The manual has six rating categories:

N.A. (Not Rated)	=	0
Unacceptable	=	1
Needs Improvement	=	2
Meets Expectations	=	3
Exceeds Expectations	=	4
Significantly Exceeds Expectations	=	5

The rating report, however, contains only three rating categories:

Acceptable	=	1
Needs Improvement	=	2
Unacceptable	=	3

Concededly, this variance is easily remedied. But one is compelled to wonder how much thought was put into the activity, given these inconsistencies, and how serious is the commitment to evaluation.

More important is that, while the procedures and objectives in the manual may be commendable, implementation, as a practical matter, by the Agency at this time would appear to be impossible, let alone on a yearly basis. The staff, directed by the policy statements to carry out the evaluations, has too many other obligations.

The manual states that “...performance evaluation is based upon observable, measurable behaviors....” (p. 5 of the manual). But the fact that the evaluation is entirely one person’s observation of another person’s action, for a period time in court at a particular point of litigation, that may or may not be litigation of substance, reduces the evaluation to anecdotal and subjective impressions. Merely applying to the observation an artificial number on a scale may give the illusion of precision and objectivity, but that would be

seriously misleading. The work of an attorney occurs not only in courtrooms but on the road, at jails, and in the office where the most time consuming and productive activities generally take place.

The manual also directs that “performance must be monitored on a regular basis...” and a “mid-year informal Performance Review (recommended).” When are the Chief Defender and other managers going to make time for all of that? The guide further directs that “a representative cross section of assessors selected, i.e. assessors who had significant opportunities to observe the employee’s...” (p.6) interviewed as part of the evaluation process. Presumably, this would include judges, prosecutors, clients, supervisors, etc. Where will the Chief Defender find the time to do all this work, supervise and evaluate support staff, attend to other administrative duties, and represent her own clients?

Nowhere in the guide are there provided relatively objective factors such as trial and motion records, case disposition results, and similar information that are more meaningful and substantive for evaluation purposes. That kind of information should be easily available and not require the expenditure of the time the manual’s procedure demands and would also provide more objective evaluative information. The court case result and how that result was achieved should constitute the foundation of any lawyer evaluation.

A practical mechanism for conducting staff evaluations needs to be promptly developed and could be done through the use of the caseload and dispositional data that the study team recommends be compiled. A good deal of the elements necessary for caseload control, attorney supervision and quality assessment need to be quantified, entered into the computer, and readily retrievable through the present computer system (JUSTWARE). If that is not possible, then a new system must be developed. Even without a computer system, the following actions still will enable some quantification of attorney performance and substantially improve supervision, case control, and objective evaluation. If a computer system is not available, the required record keeping and many of the calculations can be made by a properly trained secretary.

First Step: Every case jacket or envelope should contain a blank lined document upon which the assigned lawyer can record each activity and length of time on the day that the activity occurred. This should also include activities by support staff such as secretaries and investigators. Basic information in the caption should include:

- the case number
- the court and the court number
- the charges
- date the information was filed
- date of arrest
- custody status of defendant
- date of public defender appointment
- date of first contact with the client

- name, address and telephone number of client, defense and prosecution lawyers and the trial judge.

Second Step: Thereafter, each court appearance or other activity, dated briefly, summarized, e.g. jail visit, investigation, research, etc. should be entered. That sheet should be kept in the case jacket and the open case jackets filed in a secure location in the office, with all active files, by attorney name and in alphabetical order by defendant's name or by court case number. Supervisors and assigned attorneys should have easy access to the files. The case jacket should be in the file cabinets and not with the lawyer unless the lawyer is working on the case. The objective is to allow easy access to the file for the supervisor for purposes of supervision and evaluation.

Third Step: Most important, there must be a closing form for each case. This closing form should be standardized and developed by a computer technician and the Chief Defender or other highly experienced lawyer. The closing form should request, in preprinted form, the particular case category with space for the following information:

- case no. and court
- defense lawyer's name (the prosecutor's name not essential but, if practical, should be included)
- date of arrest, date of first court appearance, date of defense lawyer's first contact with client, date closed
- status of client (in custody, not in custody)
- pretrial motions (motions to suppress, to dismiss, in limine, etc. with appropriate code number)
- rulings on motions
- disposition
 - date
 - process (plea, trial (bench or jury); verdict/ finding (dismissal, etc.), if guilty {as charged, lesser charge, some counts and which counts, or dismissal}, or not guilty)
- sentence (when applicable)
- a few lines for defense lawyer's summary comments, if any

Contract lawyers should be required to prepare the identical closing document with the same distribution, but adding the Contract Manager in the distribution. The fee petition should include a copy of the closing document.

The best solution is that this information be placed into the computer and easily and quickly retrieved. If this is not possible, a secretary must be trained to assure that the document is completed. The secretary should reproduce four photocopies of the one-page closing document—one copy for the computer technician (if a computer is used) to enter the information into the computer, one copy for the immediate supervisor, one copy for the Regional Director, and one copy for the Chief Defender at Headquarters office. The original should be kept in the file jacket. The lawyer may also want a copy of the closing document. Each supervisor and the computer technician should keep his/her own

separate file of the closing documents in a secure place, but readily accessible for at least a year after the case has closed. The document should be kept longer in the active file for appeals and where the sentence is probation or deferred. The office file jacket should remain among the active files for at least 30 days.

2. Assuring Case Files Are Maintained and Complete

Trial lawyers must be instructed and supervisors must assure that files are maintained and completed promptly according to protocol. All supporting documents, motions, briefs should be in the file jacket. The file control secretary must be trained and knowledgeable as to what should be in the file. Access to the case jacket by the supervisor is essential to assist and, to some extent, in assuring that the assigned attorney does not have too many cases. These are all activities that can be done in the office relatively quickly and easily. But it does require active supervision and a person trained for the work and assigned this activity as an important responsibility.

In the event the computer system is unable to absorb and reproduce the required information, then information must be calculated by a person trained to perform the review and calculation functions. Totals of cases and dispositions must be up-to-date to control attorney caseload; file progress summary sheets must also be reviewed periodically to assure progress in the case. Case closing trial, plea and motion results must be maintained for evaluations and totals accumulated of each result, e.g. motions, trials, pleas, etc. to serve as the basis of reports to the Commission and the Legislature. This documentation should constitute the foundation for all budget submissions. At the end of each critical period, exact numbers of cases undertaken and closed and the kind of case almost instantly calculated and reported. Exact cost per case information may also be calculated.

3. Providing Attorney Supervision

As things stand now in the offices we examined, there is very little supervision, little or no caseload control, nor the availability of supervisory staff to provide assistance and support to lawyers. In short, even without the evaluations, there is little to no supervision. Compelling supervisors to conduct evaluations consistent with manual instructions is impossible. Indeed, for supervisors to follow the directions of the manual would be a full time job in itself.

Supervision and evaluation of contract lawyers presents different problems from that of staff lawyers. The previously retained conflict lawyer for conflicted cases recognized those difficulties and described them in a memo of October, 2006, to the Commission. It was unfortunate that his position was abolished and he is no longer involved. To date, there appears to be little or no substantive supervision of contract lawyers except in reviewing their fee petitions.

The system for providing case descriptive and dispositional information suggested above, which can provide a basis for attorney evaluation, can also provide an excellent tool for

supervision. A supervisor will have totals of cases opened, closed and ongoing, instantly. Disposition rates can be compared among lawyers. Results of litigation will be available and easily obtainable. The length of time it takes to close a case and the quality of results, however that may be defined, can be determined. Problems can be spotted; for example, if a lawyer goes for an extended period of time without a trial, or if substantive motions are not filed, or if many are filed but seldom or never successful, these situations which may signal problems can be identified quickly. When important problems are noted, the supervisor may go to client files to delve further, look at trial briefs, and examine the daily activity sheet in the jacket to see what work is being done. Of course, when the calculations signal a potential problem, the supervisor may also go to court to observe and/or solicit information from others. In most instances of observation of a potential or possible problem, a conference between the lawyer and the supervisor should occur – with substantive, concrete, and relatively objective facts on hand for the discussion.

Another source of relatively objective information for validating lawyer's contacts with detained defendants are jail records. Jails usually keep in and out records of visitors with inmates. Those records could be used to verify the attorney jail visits with clients if there are complaints or other indication of failures to communicate with clients.

If the computer system cannot be used easily, as described, additional staff may be needed for entering the requisite information manually. Regardless of whatever system is used, the information compiled will provide a foundation for meaningfully supervising staff, controlling caseloads and assuring the quality of services provided. The statistics developed are also essential for planning, budgeting and ensuring accountability to the Commission, Governor, Legislature and the public. The Commission should have required this level of reporting from the beginning. It is unfortunate that the chair of the committee for appropriations had to ask for this information as a special matter during the 2009 legislation period.

D. TRAINING

1. Statewide Training Services

The study team was able to examine elements of the statewide training program and attended the annual training session in October. That program is well thought out and is surprisingly mature considering its recent inception. The material provided is excellent and the instructors knowledgeable. The team also received praise from staff for the distance learning program which uses video technology to provide interactive access to special programs from multiple locations in the State. We were also impressed with the suite of recorded training lectures which is being developed to send to individual offices throughout the State.

However, some elements of the program should be reviewed.

There is a clear separation between the policy for training for contract attorneys and that for staff attorneys. Staff attorneys are fully compensated by release time, tuition, and room and board for the large training sessions. We were told that contract attorneys, on the other hand, are not paid for their time entailed in attending the session and also must pay for most of the costs entailed in attending these meetings. Since in some areas of the state contract lawyers are the principle providers of indigent legal services, it would appear reasonable that they receive the same training and level of support as staff attorneys in order to ensure quality of services by both staff and contract attorney resources.

The interrelationships of ongoing staff evaluation and development of meaningful training programs cannot be overstated. Because of the lack of staff evaluations, discussed elsewhere in this report, there is no comprehensive picture of what staff need to appropriately grow in their jobs. This situation leads to miscommunication, with the training program being frustrated that information has been provided but not heard, and staff, on the other hand, feeling that they have not been appropriately assisted in their career. The need to develop a systematic policy and practice regarding staff evaluations must be given a high priority. Evaluations should include external as well as self review. The process must include agreed upon goals including training and mentoring to reach those goals. The training program should have the responsibility of ensuring that training is then available to address weaknesses identified during the evaluation process, along with local mentoring. We also suggest that feedback mechanisms, such as training program evaluations by attendees, surveys, a supervisor advisory committee and focus groups be created to keep the statewide training program in touch with the needs of the staff.

2. Local Training/Mentoring

In addition to the statewide training, attention needs to be given to developing a sound training program at the local level. Repeatedly, the study team heard complaints from staff about the lack of local training. When these complaints were examined, most of them appeared to involve a desire for mentorship training rather than lectures. Staff, especially new staff, exhibited a desire to excel in their craft. However, with supervisors having full caseloads, there is a profound lack of mentoring provided by the more experienced attorneys. If it exists at all, it appears to be limited to panic answers to a hot problem, rather than ongoing counseling on the practice of law.

One exception we noted was with the frequent staff meetings in the Missoula Office, and the type of conversation at those meetings (case issues to law practice style). This type of staff meeting could be a model for offering staff development opportunities, at least in the larger offices.

3. Training for Newly Hired Lawyers

Entry level training for newly hired lawyers should be a priority. Although references were made to entry level training programs developed, the lawyers we interviewed

advised us that they received no formal training upon being hired. They did follow, for a few days, more experienced attorneys when they handled court calls.

An entry level program should last at least a week and perhaps as long as two weeks. Elements of the program should include familiarization with defender legislation, Commission standards and policies, job descriptions of attorneys and supervisors, and career advancement opportunities, applicable court decisions and statutory law. A component should also include the role and importance of motion practice and trial demonstrations -- first, by experienced lawyers and then by the new lawyer with a trainer.

4. Continuing Legal Education

Regarding continuing legal education, staff and contract lawyers should be surveyed to determine what they need. Programs should be planned, scheduled, and published for the year in advance to encourage staff and contract lawyers to set aside time for their attendance. Contract lawyers should not have to pay fees to attend and their expenses should be reimbursed.

E. Dealing with Conflict of Interest Situations

Under the law and the ethics of the legal profession, lawyers may not represent clients where there is a potential conflict of interest between the lawyer and the client. The rule extends to a law firm as well as to individual lawyers. That is, the conflict is not resolved by having each conflicting client represented by different lawyers within the firm.

The public defender lawyer is in the same position as a lawyer in private practice in conflict situations. Providing representation where there is a conflict is so serious a problem that it may cause a conviction to be reversed even if there is no direct evidence that the error was harmful to any client. Of course, where lawyers knowingly or should have known, they are providing representation in a conflicting situation, they are also subject to professional disciplinary and civil liability may arise.

Conflict situations may arise in a number of situations. Some more frequently encountered examples include:

- situations where two or more persons are charged with the same offense and they have conflicting defenses;
- in a sentencing hearing, or in plea negotiation where one client is allegedly more culpable than the other;
- where one defendant has confessed, and another has not;
- In an appeal or post conviction proceeding by a defender office where the trial lawyer was on the defender staff or was a contract lawyer and an issue is presented as to the competency of trial representation, the staff appellate or post conviction lawyer is in a conflict situation. Although the appellate lawyer is not the trial lawyer, the conflict is not resolved

because the appellate lawyer is in a different section of the Agency from the trial lawyer. They both report to the same Agency head.

Some would argue that all multiple defendant cases present a conflict and each defendant should have presented to him/her the possibility of cooperating with the prosecution. If defendants proceed to trial, unity of defenses may strengthen the defense. However, such unity sometimes breaks down in trial if not before. Conflict possibilities are not limited to multiple defendant cases, or even to the criminal side of the law. The point is the conflict issue is a frequently encountered problem. It must be immediately identified, quickly and effectively resolved. At the appellate stage the conflict potential appears to be entirely ignored.

The Montana solution to the conflict issue at the trial stage appears to be to appoint a lawyer from another regional office or, more likely, to appoint contract lawyers in the conflict situations. In the appellate situation, the Appellate Division appears to continue to provide representation even though an allegation of ineffective trial representation has been or may be made regarding the Defender staff or contract lawyer.

In the context of the Montana Defender Agency, we see the question taking a twofold thrust.

First: in the multiple defendant situation where a staff defender represents one defendant in a conflict situation, is the conflict resolved by the appointment of a contract lawyer or a staff lawyer from another region for the other defendants?

Second: where a defendant has been convicted when represented by a staff defender or a contract lawyer, may that defendant be represented by the appellate office of the Defender Agency when there is an allegation that the defendant's trial counsel was ineffective, i.e. incompetent?

As to the conflict issue at the trial level, it is strongly suggested that the independence of the contract lawyer retained in a conflict situation or staff lawyer from another Region does not resolve the conflict, either in form or substance. In practice, whether intended or not, the Agency is highly centralized. The Chief Defender exercises complete authority throughout the Agency subject only to the Commission, and she is not reluctant to exercise that authority. Regions are not independent entities; the enabling legislation confers authority upon and responsibility for everything and anything that relates to representation of the indigent to the Chief Public Defender. The contract lawyer division also is within the entire responsibility of the Chief Defender. The only restraint is the Commission's ability to remove the Chief Director. The Director has exclusive control over all staff and all cases undertaken by the Agency.

For example, under the Montana OPD organizational structure, the contract manager is hired and supervised by and is responsible to the Chief Defender. The Regional Deputy Defenders are hired by, supervised by and responsible to the Chief Defender. The Training Coordinator, who participates in identifying conflicts, has that same situation;

moreover, the selection, evaluation, and appointment and retention of all contract lawyers are the responsibility of the Chief Defender, along with the Regional Deputies and the Contract Manager. Indeed, the Contract Manager, as well as the Regional Deputies, review, approve, modify or reject fee petitions filed by all contract lawyers. Where expenditure in excess of \$200.00 may be required, the contract lawyer must obtain approval for the expenditure from the Contract Manager, the Training Coordinator and the Chief Defender. The contract lawyer's rate of compensation and total compensation for services are determined by the Defender Agency. The Chief Defender, with or without the advice of the Regional Defender and Contract Manager, may control case assignments to contract lawyers and has the authority to decide what lawyers make the contract lawyer list and who remains or is stricken from that list. Moreover, all payment of funds must be made through and by the authority of the central auditing section in the central Agency Office. That auditing department is under the authority of the Chief Administrator who is hired by and responsible to the Chief Defender.

In regard to the second situation – appellate cases involving allegations of ineffective counsel -- some have argued that in all appellate cases a lawyer who represents the appellant must be entirely unconnected to the trial lawyer. The appellate lawyer, however, must always consider an ineffective trial lawyer argument, particularly under the current law of waiver.

Effective July 1, 2006, the OPD retained a conflict attorney. He was hired by and responsible to the Commission, not to the Defender Director or any other staff supervisor. His position was entirely different and separate from the Contract Manager's. His office was his own, not an Agency office. He presented a report to the Commission, dated October 13, 2006, that addressed the problems we have discussed above except for the appeal situation and other post conviction representation. The report suggested that the solution at the trial level is for the Commission to maintain a "Conflicts Coordinator" who reports directly to the Commission and is independent of the Defender Administration. He reached this conclusion after examining how state programs in Colorado, Iowa and Georgia addressed the trial conflicts problem. We agree with his recommended approach.

However, we were told that the Chief Defender strongly opposed the recommendations submitted in his October report and insisted that the conflict situation be handled within the Defender Agency, under her supervision. As a result, the Commission ended the term of the independent Conflict Office, effective December 31, 2006 and lodged ultimate responsibility for all conflict cases with the Chief Defender. Now, a Regional Director, the Training Coordinator and the Contract Manager decide the conflict issue, with the Contract Manager assigning the conflict case to a lawyer on the contract lawyer list or a staff lawyer from another region. Supervision remains within the Agency hierarchy.

We were told that the Agency imposes a "fire wall" between the Contract Manager staff and the Conflict lawyer. However, the "fire wall" at best only bars the sharing of confidential information – which is only one aspect of the conflict problem. The Agency hierarchy still has substantive oversight and supervision over the contract conflict

lawyers. The Contracts Manager, the Training Coordinator and the Region's Deputy Defender remain under the total control of the Chief Defender for all other purposes. All three are employees at will -- hired, fired, disciplined, etc. -- by the Chief Defender. The Regions are simply not independent. The potential conflict with appellate and post conviction matters is also totally ignored.

The appropriate solution is to establish a trial and appellate office entirely separated from the Defender Agency. That office must be independent from the existing state defender agency. In a few cases where more than two defendants are charged, the trial judge should appoint a private lawyer who is without any connection to the Defender Agency, either as a staff attorney or a contract lawyer. It would be best to have state funds separate from state defender accounts pay for those appointed lawyers. However, if state funds are not available, funds will have to come from the county. This solution would return control over conflict lawyers to the trial judge in the very few cases in which such conflicts arise and cannot be handled by the recommended independent conflict office. While this proposed solution would, unfortunately, in a limited way defeat one of the objectives of the 2005 Defender Legislation, it would be a far better option than the current practice. The independent alternative office, however, is the better solution as long as the private bar involvement remains.¹⁵

F. THE ROLE OF THE COMMISSION

Pursuant to the Montana Public Defender Act (Ch. 449, {2005}), the Office of the State Public Defender was established. A very important component of the program was the establishment of an eleven member State Public Defender Commission. The

¹⁵ Commission Standards III, 5A and 5B address the conflict problem but authorize appointment of conflict lawyers from the Defender Agency staff who are in a different Region or a contract lawyer. Briefly, the Regions are described in this standard as independent entities and create the illusion that each Region operates independently. The Appellate Office is similarly described as an independent office. But that is not the fact! While the Legislation authorizes the Commission to create up to 11 Regions, neither the Regions nor the Appellate office are independent units in fact or in practice. The Defender Legislation very clearly and unequivocally vests complete supervisory authority of the entire system with the Chief Defender. The Chief Defender is the sole person responsible to the Commission. As noted above, the Chief Defender by legislation has the authority to hire, fire, discipline, etc. all staff. That includes the Appellate Director, the Contract Manager, and the Regional Defender Directors. Furthermore, all staff is employees at will. The authority of the Chief Defender over the staff is unlimited, except as to general principles applicable to any public employee. The Standards statement, "Neither the Chief Public Defender (or anyone else in administration) exercises general control or influence over the handling of individual trial divisions or appellate division cases, has access to client files..." is simply not the fact in practice or under the provisions of the 2005 Defender Act. While the Chief Defender may not get involved in any particular case, she has the authority to do so. Moreover, this Defender Director made it very clear to the study team that she emphatically exercises that control to hire, fire, discipline staff at any level. One of our concerns has been that there is not sufficient delegation by the Chief Defender. Her response to that concern has been that she has the responsibility; therefore, she must be involved. It is inconsistent to assert independence for the Regions in terms of conflict matters, but, at the same time, complete authority by the Chief Defender and administrative office over all matters in the Regions and in the selection and retention of contract lawyers.

responsibilities of the Commission include hiring a Chief Public Defender for the Agency, and approving a “strategic plan” for the delivery of public defender services across Montana.

In addition, according to the Statute, the Commission must also “establish statewide standards for the qualification and training of attorneys providing public defender services.” Moreover, these standards must insure that the lawyers are competent to handle the cases to which they are assigned. According to the Act, the standards must also “provide for caseload parameters, performance criteria, and performance evaluations.”

In fact, the Commission has done far more than the minimum. The Commission has met monthly since its creation. They have authorized 11 regional offices and a headquarters office in Butte. They have also hired a Chief Defender and provided for the use of contract lawyers in sparsely populated regions and in conflict cases. The Commission is also required by the Act to insure that contract attorneys also operate in accordance with standards adopted by the Commission.

This Commission has gone far beyond the minimum requirements contemplated by the Act. This Commission is one of the first in the Country to adopt the “ABA Ten Principles of a Public Defense Delivery System,” which was recently promulgated by the American Bar Association. The Commission had also adopted protocols for the utilization of mental health professionals, abolished the existing Appellate Defender Commission and established a new Office of Appellate Defender for the provision of counsel in appellate matters for the indigent, which would be part of the OPD.

With respect to determining eligibility, the Commission changed the process for determining who shall qualify for public defender services from the judiciary to the Office of the State Public Defender. Under the new procedure, the OPD reviews “a detailed financial statement” and an affidavit from the defendant. The defendant will qualify for defender services if his/her income is at or less than 133 percent of federal poverty guidelines or if he is unable to retain competent private counsel without substantial hardship. The determinations of the State Public Defender are reviewable by the Court.

Of additional significance is the Commission’s passages in June, 2007 of standards relating to the responsibilities of counsel in the trial of a criminal case. These standards are designed to be all inclusive, covering matters from the attorney-client relationship to caseloads, to duties of defense counsel including developing a theory of defense, discovery, training, etc.

In sum, this Commission has given considerable thought to the range of issues the new statewide defender system should address, providing vision and guidance in numerous areas. Unequivocally, the Commission deserves the highest marks possible for its role in the creation and development of this defender system. That is not to say that numerous challenges remain, many of which are addressed in this report.

G. CASELOAD AND WORKLOAD DATA

Adequate data to describe the Agency's caseload (e.g. number of cases handled) and workload (e.g., the nature and extent of time in handling the caseload) is essential to provide an accurate picture of the work being performed as well as the resources needed to perform it. Case disposition data, indicating the age of cases at disposition, the method of disposition (e.g., trial, plea, etc.), and the nature of the disposition (e.g., guilty, not guilty, dismissed, etc.) is essential for a number of reasons, none the least of which entails assisting supervisory staff of the OPD to assign cases fairly to the staff and contract attorneys, supervision of case progress; evaluation of attorney performance, and planning for resource needs and appropriation requests.

As noted earlier, currently, the OPD uses a system known as JUSTWARE into which OPD lawyers are to enter information about the cases they are handling. Deficiencies in this process have already been noted.

1. Assessing the "Weight" of a Case: Attorney Caseload Standards

In order to fairly distribute the cases accepted, Agency staff developed a system of weighted system of units assigned to each case according to case type which was designed to reflect the relative work entailed in handling the particular type of case. Under this system, the following weights are assigned:

<u>Case Type</u>	<u>Equivalent Case Unit</u>
Felony	1.00
Misdemeanor	0.50
Petitions to Revoke	0.50
Dependent and Neglect	1.50
Guardianship	0.50
Fugitive	0.25
Civil Commitment	1.50
Juvenile	0.75
S.C.T. Appeals	6.00

Based on these conversions of cases by case type to case units, the following maximum case units have been adopted:

- (1) In a 12 month period, no attorney can be assigned more 150 case units.
- (2) In a given month, no attorney can be assigned more than 15 units.

While this attempt to weight cases in terms of the level of effort required for representation is admirable, the approach used has numerous deficiencies:

First: What is the foundation for determining the weights? Most case weighting systems that have been developed in other jurisdictions have been designed based on an analysis of the actual time entailed in handling different types of cases. Not only was this

analysis not conducted in Montana but the information that would be helpful in validating the case weights developed is not maintained. What is the basis for determining that a dependent and neglect case takes 1.5 times the effort of a felony case? or that two misdemeanor cases equal a felony in terms of time and effort?

Second: Why was only a general “felony” category used when all other categories are relatively discrete and narrowly constrained. Felony offenses range from non-violent property offenses to capital murder. Usually, the property offenses are relatively easily resolved. On the other hand, capital murder cases usually present several unique problems in trial and sentencing procedures which are relatively complex. Accordingly, felony cases should receive a range of case weights.

Third: No allowance has been made for cases that require a trial.

Fourth: Although National Standards suggest a maximum caseload of 150 felonies per lawyer per year or 400 misdemeanors per lawyer per year¹⁶, these are approximations only, and should be tested against the real world in the jurisdiction in which they are applied to maintain accuracy. The numbers promulgated in national standards constitute a rule of thumb only, and the number of cases that a lawyer can handle in a given year may vary with the amount of travel necessary, whether or not investigators are available, the level of experience of the lawyers, etc. At a minimum, the management of the OPD should consider a caseload study to determine how much time it takes to close different categories of cases in the Montana Courts.

Fifth: An additional problem to be overcome with implementing a case assignment system is that managers do not maintain an up-to-date current caseload count for the lawyers they supervise. At the present time the OPD is unable to quickly and efficiently keep abreast of case intake and disposition figures for cases being handled.

The present caseload standards therefore do not appear to have any support or foundation.¹⁷ Moreover, caseload standards are impossible to implement without easily retrievable and relatively descriptive case closing records.

Sixth: Apart from the soundness of the caseload standards developed, the last and perhaps most important question is what does OPD do when all staff are at the maximum caseload and budget constraints prevent assignment to contract lawyers? We could find no policy that would be applied in such a situation.

¹⁶ Need citation

¹⁷ It should be noted that the Defender Commission enacted Policy No. 120 entitled, “Time Reporting” with an effective date of July 1, 2006. It required “all attorneys... (to) maintain and report work time for each case...biweekly....” Time was to be reported “in increments of 0.10 of an hour.” It is apparent that this policy has never been implemented. If it had been implemented, it would have been an excellent resource for developing relatively objective caseload standards.

2. Examination of Selected District Court Case Files Regarding Method of Disposition

During the course of our interviews, some individuals expressed concern that the Defender Agency was compelling too many clients to plead guilty because of having too heavy a caseload and were pressured by administrators to record a high rate of dispositions. Since, unfortunately, the Agency could not provide data on the method of disposition for cases handled by OPD staff or contract attorneys, we therefore hoped to shed some light on the issue through a cursory examination of randomly selected case files entailing representation by the OPD staff or contract attorneys.

During the January, 2009 site visit, a sample of 59 concluded District Court cases in which the State Defender Office provided representation in Lewis and Clark, Missoula and Butte-Silver Bow counties was examined to determine the method of disposition (e.g., plea or trial) as well as any other substantive motions that had been filed. Of these 58 cases, 29 had been assigned to contract attorneys and 29 cases were assigned to staff attorneys.

All reviewed cases were all originally charged as felonies.

The results of our examination, summarized below, were derived from the summary sheet ("Case Register Report") that is part of the court file for each case. This report summarizes the progress of the case from the filing of the information, e.g. the official charging document that starts the court action and advises the defendant of the charges, to the finding, or verdict, judgment and sentencing. Trial court post sentencing proceedings, including probation violations were also recorded, but are not reported here unless the judgment was modified or reversed. The docket record contained the names of the trial judge, prosecutor and defense lawyer and records the date of each court appearance, and in very brief summary form, what occurred in each court appearance.

The results of this examination were as follows:

(1) *Cases Handled by Defender Staff Attorneys:* (29 cases):

Total convictions on pleas if guilty: 23

Of that number

- 10 appeared to be pleas of guilty to a lesser charge than originally filed, or to fewer counts than originally filed.
- One of the examined cases went to jury trial, resulting in a guilty verdict.

Three cases were dismissed:

- Two of these entailed a motion to suppress the defendant's statement which was litigated and in which the trial judge ruled against the defense. Nevertheless, the case was dismissed on the state's motion. (The docket record does not disclose why the prosecution moved to dismiss the case.)

Three other cases were dismissed although there was no indication on the docket record of any pretrial evidentiary litigation, or any other information explaining the dismissal. In all cases there were omnibus motion dates set. Motions probably were filed and ruled upon, but the docket records disclosed neither the kind of motion nor the court ruling, except where a motion required evidentiary hearings.

(2) *Cases Handled by Contract attorneys:* (29 cases):

Total convictions on pleas of guilty: 27

Two separate cases went to jury trial. In both cases, verdicts of not guilty were returned. Pretrial motions of substance were filed in two cases, but rulings were adverse to the defense and are included in the 27 guilty pleas.

It should be noted that the large majority of guilty pleas resulted in either deferred sentences or in a specific sentence of incarceration imposed but then entirely suspended for a period of probation. A number of violations of probation allegations were recorded. However, because most cases were from July 1, 2006, to early 2008, with probationary sentences still being served, it would be impossible to determine how many probationary sentences was successfully completed.

One may conclude from this limited docket analysis that there were relatively few trials being conducted but that those that were conducted resulted in not guilty verdicts. However, the present examination was very limited and the sample small, involving only three District Courts. Dockets of the courts where most misdemeanors are disposed of were not examined. Unfortunately, the Defender Agency does not maintain and report any statistics illuminating the results of its representation of clients. The least one may say with confidence is that this examination does not alleviate concerns that the Defender Agency may be churning out guilty pleas when cases should be contested. This issue will be further discussed in subsequent sections of this report.

H. PROVIDING ADEQUATE AND USEFUL INFORMATION TO THE COMMISSION AND THE LEGISLATURE

The Legislative Committee reviewing OPD's statistical submission for FY 2010 criticized it for failure to provide the required information it needs to justify its budget and any increases thereto.

"Data such as the total caseload and workload of the Public Defender Program is not available. The lack of total caseload and workload data makes it difficult to evaluate the Agency's resource level in comparison to the work that must be accomplished. The Agency did provide information on the number of new cases assigned...however, without data on the number of case closures and active cases that are open, the net increase or decrease in caseload is unknown....The

Legislature's ability to correlate funding with the level of cases or work that must be accomplished is compromised by the lack of data on net increase or decrease in the total caseload and workload." (LFD ISSUE for 2011 BIENNIUM DISCUSSION)

Initially, the Agency submitted to the Legislature the number of open cases assigned to each lawyer; however, it did not submit information on cases closed. After receiving this criticism from the Legislative Fiscal Division, on February 5, 2009, the Agency then submitted information on case closures. It is hoped that such information will be tracked now by the Agency and supplied on a regular basis to the Commission and the Legislature.

In its draft of "measurable goals and objectives" for the Joint Appropriations Subcommittee on Judicial Branch, Law Enforcement, and Justice, on February 4, 2009, the OPD had promised the following for next year:

"OPD shall track the outcome of cases.
OPD shall track the length of time between a case's opening and closing.
OPD shall report on the overage cost per case type....
OPD management shall monitor attorney caseloads to assure that if they exceed 150 units the attorney is spending adequate time on clients' cases."

Of course, in order to accomplish these goals, there will have to be a major change in the Agency's operations in terms of the data it compiles and the uses it makes of this information. For example, in interviews with staff and contract attorneys, some contract attorneys stated that they had never heard of JUSTWARE, and did not submit any statistical information on their cases to the Agency. With respect to staff attorneys, at least in one of the offices, the type of case is not recorded (e.g. murder, robbery, etc.), nor the method of disposition, nor the ultimate disposition of the case.

Even if the closure of cases is recorded, (as in the Agency's submission to the Legislature on February 5, 2009), that information alone is insufficient. At a minimum, additional descriptive information regarding the disposition – e.g., the method of disposition (bench or jury trial, plea, etc.) needs to be provided as well as the length of the outcome (e.g. guilty, not guilty, guilty of lesser offense, sentence, etc.) to provide an accurate picture of the case disposition and the success or failures of the public defender system. For example, if in the first year there were no trials, but every case was disposed of through a plea agreement or finding of guilty, but then in the second year, "not guilty" appeared in the system, and there were a significant number of trials, a clearer picture of the progress of the OPD would begin to emerge.

Capturing the above information is also required if the Agency is to comply with the mandate of the Legislature to provide it information on the number of cases which were closed in the prior year and how many open cases there are now.

The Agency also promised to provide cost data by type of case. Again, this will not be possible unless the nature of the disposition of each case type, including its opening and closing dates, are recorded in the information system. Providing an accurate and complete record of this information is a challenge for the Agency, but it is one it must meet if they expect to be refunded in the years to come.

This information is needed not only for the Agency's internal management and operations. It is also becoming apparent that the OPD's failure to have critical information describing its work is creating a poor impression in the Montana Legislature. As the situation currently stands, the Defender Agency will bear much of the responsibility if it is under funded for the 2010-2011 years. It has not fulfilled its obligation to document its caseload and its disposition of cases in detail. The Agency has not illustrated in concrete terms the services it performs, the benefits it provides to the State, and its accomplishments, and it has failed to document its resource needs with concrete, objective data. That is the Agency's fault — no one else's.

Other sections of this report further address the use of disposition data.

I. ROLE OF THE CHIEF DEFENDER: ACCOMPLISHMENTS AND CHALLENGES

The role of the Chief Defender in the Montana State Public Defender System – or any other state defender system – entails providing the leadership, management skills, and vision to ensure that the public defender system effectively carries out its mission and adheres to applicable professional standards and legislative requirements. In addition to the legal expertise and knowledge of the issues and elements entailed in an effective indigent defense service delivery system, the position requires the management expertise required for any large organization – resource development and allocation; human resource management, training, budgeting, staff morale, etc.

The present Chief Defender, Randi Hood, the recipient of the Public Defender of the Year award in 2004 and recognized throughout the state as an outstanding attorney, had previously served as the director of the Helena public defender office. Moving from a county funded defender office with a staff of several lawyers and two or three support personnel to a newly established state agency with hundreds of staff and thousands of cases in a state as geographically large and complex as Montana presents a major transition, however, with monumental challenges.

To her credit, she has accomplished a number of major tasks necessary to implement the new system, including:

- Organizing the state agency into 11 regional offices;
- Hiring trial lawyers, appellate lawyers, and administrative staff and creating a supervisory structure for them to work within;
- Contracting with private lawyers to take conflict and overflow cases as well as cases in sparsely populated areas
- Creating a training program for all staff

- With the help of the Commission, establishing standards for the staff, promulgating rudimentary caseload maximums, operating procedures for the trial lawyers, protocols for mental health, indigence criteria, a manual for the investigators, etc.

And yet, with all of the implementation tasks she has accomplished, there are areas of concern highlighted throughout this report which relate to the overall management and leadership functions which the Chief Defender needs to provide that have not been fully developed and which must be attended to if the Agency is to grow and deliver the promise of effective legal services to indigents that the Montana Legislature, the Commission, and the public envisioned. In part, this situation may be the result of mixed expectations the Commission may be setting for the Chief Public Defender – e.g., primarily litigation expertise? Or primarily the expertise needed to manage and develop a large, complex organization such as the Montana Public Defender Agency and ensure that it complies with applicable professional standards, is responsive to public concerns, and is accountable and transparent in terms of its operations and use of resources.

Among the range of current challenges confronting the Agency which became apparent to the study team with which the Chief Defender must deal include:

- Policy Re Enforcing Caseload Limits for Attorneys

Attorneys apparently are not allowed to refuse cases even if they feel that they cannot handle them due to their heavy caseloads. This situation violates American Bar Association Ethical Standards and should be reconsidered and dealt with in a serious and thoughtful manner.¹⁸

- Ensuring Representation at First Appearance

Public Defenders are expected to represent indigent Montana citizens accused of crime prior to their first court appearance.¹⁹ In Cascade County, for example, the Public Defenders do not fulfill that function. Although they appear in Court with the defendant, they tell him/her and the Court that they do not represent the defendant yet. It is not until after that initial appearance that the defender's representation officially begins. (See Appendix B with correspondence and petition filed by Dan Donovan challenging that procedure and resulting Order for Cascade County.)

- Conflicts of Interest

As discussed earlier, there are several possible situations that can create conflicts of interest based upon the present structure of the Agency.

¹⁸ See ABA Ethics and Professional Standards 06-441 (2006).

¹⁹ See *Rothgery*, Note 2 *supra*.

- when there are co-defendants, and one co-defendant is represented by an assistant public defender from one regional office, and the second co-defendant is represented by an assistant public defender from another regional office;
- when one co-defendant is represented by a contract lawyer and the second co-defendant is represented by a staff lawyer from the nearest regional office.

The reason that these situations constitute possible conflicts is because in the case of two lawyers from two different regional offices, they both are ultimately responsible to the same Chief Defender. Similarly, in the case of the clients represented by a contract attorney and a staff attorney, both lawyers are ultimately responsible to the same Chief Defender. (This issue is discussed in more detail in another section of this report.)

- Staff Morale

The study team was told over and over again that staff morale is low. The problem was reflected in numerous interviews with staff, and the high turnover in the Agency. For example, five of the original regional directors are no longer employed despite the relatively brief period in which the state system has been operating. While there may be number of reasons for this -- the work itself is stressful, and the pressure on defense lawyers is enormous -- it is clear that other factors, discussed below, likely also play into this situation. A number of interviewees characterized the office environment as one promoting “a climate of fear and retribution” and “management by intimidation.”

- Salary Discrepancies

A number of factors play into the perception -- and reality -- of salary discrepancies among OPD staff. First: the defender staff receive less money for their work than the prosecutors who do comparable work. Second: there does not seem to be a clear track in terms of who receives what salary, when there will be raises, and what those raises might be based upon. Third the perception conveyed by some interviewees that the Chief Defender plays favorites in assignments, promotions, salary differentials, and in the allocation of resources to regions, depending upon whether one is in her “inner circle”

- Staff Perception that Resources are Unevenly Distributed

There is a feeling among those we interviewed that the Agency does not treat all of its offices consistently or fairly. For example, it was noted that there were fewer lawyers designated for the Billings Office, than for the Missoula Office which serves a smaller population. When this comment was relayed to the Chief Defender, her response focused on the possible source of the comment rather than its substance.

- Hiring Process

A related problem resulting from the Chief's Defender's lack of delegation of authority is reflected in the hiring process which reportedly is slow. The Chief Defender feels that she must personally hire all staff. Again, this is impossible given the rest of her responsibilities. A possible solution is for her to delegate responsibility for recruiting and interviewing to the regional deputies and/or managing attorney in the office seeking to hire the staff, with her "signing off" at the end of the process. Of course, the Chief Defender must provide oversight. But the regional deputies are in salary exempt positions and therefore should be able to exercise appropriate hiring and firing responsibilities. Although the Chief Defender may have the ultimate responsibility to hire and discharge staff attorneys, she should be able to rely upon applicant resumes, reports and the evaluations and recommendations of the regional deputies for the information needed to make these decisions. The same principle applies to decisions regarding contract lawyers.

- Availability of Investigators

With respect to the use of investigators, contract attorneys were told that investigators were no longer allowed to work on misdemeanor cases. This limitation will seriously damage the defense ability to prepare these cases for trial or plea, and would also violate Commission standards.

- Case Reviews with Attorneys

Although there are staff meetings conducted in each regional office, cases are not generally discussed with the lawyers. These regular reviews are extremely important so that experienced attorneys can review each defender's caseload to give suggestions for motions, strategies, etc. based upon their experience and thus avoid tactical or legal errors. The lack of such reviews may be due to the heavy caseload carried by each regional deputy director. If that is the case, perhaps the number of cases carried by the regional directors should be substantially reduced .

- Perceived Arbitrary Reductions and Delays in Contract Attorneys' Vouchers

Contract attorneys do not receive supervision of their cases; however, their fee vouchers are often cut. Recognizing that many contract attorneys are working below their normal billing rate, to add injury to insult, the fee requests that they do submit are also frequently and arbitrarily delayed for weeks or up to four months. In addition, although office expenses associated with public defender cases often averaged \$125.00 to \$160.00 per month, they received only \$25.00 per month from the Agency for these expenses. For these reasons, some of the contract attorneys told us that they only accept a limited number of cases per month, mostly misdemeanors.

- Availability of Research Tools and Training for Contract Attorneys

Several contract attorneys stated that they could not get access to LEXIS or WESTLAW through the Agency, nor were adequate law libraries available to the staff. Other contract attorneys told us that they received no reimbursement for travel costs to attend training provided to staff attorneys. With a system such as Montana's, with heavy reliance on the services of contract attorneys, these problems need to be dealt with promptly.

DRAFT

IV. CASE STUDY: REGION 9: BILLINGS (YELLOWSTONE COUNTY)

Although the limited resources available for this study precluded visits to each of the eleven regions plus the central office, several regions were selected for on site study which appeared to be reflective of the range of issues the regional offices were confronting. The results of the study team's visit to Region 9 (Billings/Yellowstone County) are summarized below because they provide an example of the problems being experienced in the present system, recognizing that the situation in Billings may be worse than in other regions.

Billings is by population the largest city in Montana, with a population is 97,000. Yellowstone County had an organized public defender system for several years prior to the July 1, 2006, when the present state agency was created. The county employed defender staff who, according to reputation, performed adequately. However, with the development of the state system, the office became one of the 11 regional offices and additional responsibilities for appointing attorneys to non criminal cases (e.g., juvenile, dependency, etc.) was added. The office staff, however, was not increased, but the present contract lawyer program was added.

The fundamental problem at the Billings Office conveyed to the study team is that the office is understaffed., resources are not allocated in proportion to their caseload and training is inadequate. These problems are further described below.

According to statistics provided by the Chief Public Defender to the Public Defender Commission in a September, 2007 meeting, the Billings Office handles more case than any other office in OPD, as reflected in the following statistics:

Billings (Region 9): handled a total of 7,710 cases for the year

Missoula (Region 2): handled a total of 5,271 cases for the year.

Kalispell (Region 1): handled a total of 4,742 cases a year.

At the time, Billings had 14 attorney positions but not all of these positions were filled at the time of the team visit in October, 2008. Numerous attorneys have left over the last two years. As of March 2009, the authorized staffing had been increased to 16 attorneys.²⁰ Missoula, on the other hand, has 22 attorneys plus law school interns. (The University of Montana law school is located in Missoula.) Kalispell has 13 attorneys. (16 attorneys as of March, 2009)

Available information indicated that the Agency allocates more money per case to eight out of the 11 Regions than it does to Billings. Dividing the total number of annual

²⁰ Two attorney positions were added for the Region Nine Office in Billings as of March 2009.

caseload by the number of attorneys authorized, the attorney/annual caseload ratio in representative regions is as follows:

REGION	ANNUAL CASELOAD	NO. AUTHORIZED ATTORNEYS	ATTORNEY/ANNUAL CASELOAD RATIO
Region 1 (Kalispell)	4,742	16	1/296
Region 2 (Missoula)	5,271	22 plus law school interns	1/239 (not factoring in law school interns)
Region 9 (Billings)	7,710	16	1/481

The report did not distinguish “case” to indicate the kind of case, e.g. felony, misdemeanor, etc. While it is not clear how “cases” are counted, the summary is presented for purposes of comparison to address the issue of understaffing and case overload that was raised during the course of this study.

The understaffing situation in Billings results in defender attorneys having too many cases and are considerably over the caseload standards established by the Public Defender Commission.²¹

The caseload limits established by the Commission are supposed to prevent each attorney from handling more than 12.5 units of cases at a time. As noted elsewhere in this report, “units” are defined by case type, e.g. felony = 1.0; misdemeanor = 0.5, etc. However, this limit does not appear to have been followed. Many attorneys in the office have 70 to 125 felonies at any one time. According to information the team received, when the office was a county system, the number for felonies was more like 40 at a time.

A case cap under the proposed weighting system, even if followed, is unrealistic because the more complex felonies take much longer to reach final disposition and cases are not being distinguished on the basis of complexity under the weights proposed. For example, a murder carries the same weight as a felony theft case. This lack of differentiation for felony case weights means that attorneys will have an increasing number of more

²¹ It is interesting to note that in a report for the Fiscal Year ending June 30, 2007, Region 9 had a total case count of 6,740, with expenditures totaling \$2,940,963. Missoula’s case count for that year was 5,697, with expenditures were \$3,367,054. Billings reported over 1,000 more cases than Missoula, yet Missoula received \$426,000 more than Billings. There was no explanation for this remarkable difference.

This pattern of Region 9 accumulating considerably more cases but less funding appears to have continued into Fiscal Year 2008. Reported cases opened in Region 9 for that year were 5,347, while 3,311 cases were opened for the same period in Region 2 (Missoula) Nevertheless, Region 2 was authorized to have 22 staff lawyers, and Region 9 was authorized only 14 staff lawyers. Differences in contract lawyer activity cannot account for the difference, but even there, Region 2 reported 41 contract lawyers authorized while Region 9 reported authorized 39 contract lawyers.

On their face, the Billings’ staff complaints regarding inadequate allocation of resources appear to be justified. That office continually opens more cases, yet receives materially less funding than other offices. There does not appear to be any explanation for the disparity, nor has management taken steps to address the problem. Staff members believe that the discrimination arises because the office has repeatedly asked for increased funding and complained that caseloads are too heavy. Therefore, standards cannot be complied with.

difficult cases as time passes since the easier cases will be more quickly closed. As has been suggested, if a weighting system is implemented, felonies should have two or possibly three different weights assigned numerically to reflect the relative complexity of the case.

The reported inequity in resources provided to Region 1 gave rise to the following types of specific complaints from staff attorneys regarding the present work load:

- We cannot meet with incarcerated clients on a weekly basis. If we have 25 incarcerated clients at one time, which is common, we would have to spend 25 hours a week meeting with incarcerated clients. We typically meet with other clients, read and investigate files, prepare motions, prepare for sentencing, etc.
- If we conduct initial client interviews according to the standards, each interview would take three or four hours. If we receive three new cases a week, which is common, we would need to spend an additional 12 hours a week just conducting initial client interviews. Also, at initial client interviews, we rarely have a copy of the investigative file, so talking about the details of the case and evidence would be a waste of time at that point.
- The standards require that we remove any communications barriers. Many indigent clients have hearing and/or vision problems, literacy issues, or do not speak English. There is no funding to buy them hearing aids or glasses. We do not have the staff to meet with illiterate clients and read the investigative file to them. We also do not always have the funding to hire translators for non English speakers, and sometimes translators are not always available.
- The standards require that we always examine physical evidence whether it is drugs, weapons, etc. This is not being done because we do not have time.
- The standards require us to view every bit of audio and visual piece of evidence such as DUI tapes, pictures, surveillance tapes, etc. This is not being done; we do not have time to do it.
- Prisoners arrive only 15 minutes prior to first appearance. A dozen or more clients are usually in court for arraignment. No preparation can be done in the 15 minutes before a lawyer must be in court.
- The Standards require us to advise our clients of the effect a state conviction may have federally. This is unrealistic. Most state public defenders do not even know what the federal crimes are, such as the Hobbs Act, Lacy Act, or RICO let alone how to calculate federal sentencing guidelines. We certainly do not have time to run the guidelines or counsel our clients about implications.

- We do not represent clients at pre sentence interviews as the Standards require because of our heavy caseloads.

In addition, many attorneys have had claims and complaints made against them by defender clients. According to the staff, this is a byproduct of understaffing and their high caseloads which do not give them enough time with individual clients.

Attorneys are Not Trained Properly

The turnover among attorneys in Region 1 has been so high that some attorneys are there only a few months, and they cannot be trained in that amount of time. The more experienced attorneys are too busy to help the less experienced.

There is no formal training in place.²² The novice attorneys are just thrown into a full caseload and left to sink or swim.

Attorneys Who Voice Concerns are Retaliated Against

A common staff complaint was that the Defender Agency is run with fear, secrecy, and retaliation. Most people are afraid to say anything about the working conditions or workload because they are afraid of being retaliated against. Morale is very low.

Other Complaints

- Management lacks appropriate training.
- The computer system (JUSTWARE) is worthless.
- Funding is inadequate. ("We buy our own pens.")

Region 9 now has its third Deputy Defender Director. We do not know why the first Director left. However, we understand that the second Director left because the workload was not manageable and the central office was of no assistance, instead, it was an obstacle.

While the problems described in Billings may be more acute than in other Regions, they are, nevertheless, reflective of problems at least several other Regions were experiencing, resulting in perceived difficulties in their ability to comply with Commission Standards and Policies. The problems may appear more acute in Billings because the state took over what apparently was an efficient and effective county defender office.

One of the principal benefits of a state funded program is flexibility and the capability to transfer resources from one locality to another, as necessity requires. In the example of

²² There is a staff training coordinator in a salary exempt position. He has presented a number of training sessions. The problem referred to here may be entry training for the new, inexperienced staff and contract lawyers.

Region 9, however, the office has not seen any significant increase in resources commensurate with the caseload it is undertaking.

The problem may lie in the failure of the headquarters office to extract adequate case intake and disposition data. Such data, with appropriate detail, should be received at least monthly. The limited data that the study team has received appears to be a product of our requests -- and not data immediately at hand -- or a result of demands of the Legislature. As inadequate as the available data is, it does have some value in giving notice that Region 9 has been seriously understaffed. Nevertheless, the study team sees little indication that the available, though limited, data has been used in any way as part of the Agency's management or planning functions.

The situation in Region 9 also illustrates the futility of enacting quality standards and policies, but ignoring their implementation. The failure to implement those standards and policies renders those standards and policies meaningless, or even worse, misleading. It may be that the failure of the Agency's internal information collection is part of the cause for the uneven distribution of resources. The Billings situation is one additional illustration that there is not enough information being compiled to adequately manage the Agency.

V. RECOMMENDATIONS

The following is a summary of the study team's recommendations, many of which have already been presented in the body of the report. The recommendations presented are designed to address the information and management deficiencies that have been addressed in the foregoing sections of this report and assist the Commission in developing further its strategic planning efforts.

A. MANAGEMENT AND ADMINISTRATION

Recommendation 1: The OPD needs to provide detailed information to adequately describe the Agency's caseloads, dispositional processes, attorney workload, and related data that describes the Agency's operations and services being performed.

The 2005 Defender enabling legislation requires the Agency to provide detailed caseload and disposition information. Defender Commission Standards and policy requires the same information in more detail (Standard V-1, 2, Policy 115, 108). That information, in sufficient detail, has been promised by OPD staff. That promise has not been fulfilled. As a result no data driven substantive oversight is possible. Caseloads of staff attorneys and contract lawyers are at best minimally controlled; statistics on case disposition are not accumulated or reported. Time records of staff lawyers also are required (Policy 120). However, we did not see any such records. Certainly, no such records are referred to or utilized in any evaluation of lawyers, assignment of cases, or performing the supervision function. There was substantial evidence that at least some of the staff lawyers have too many cases, and many of the Commission standards are not followed and, perhaps, totally ignored.

Recommendation 2. The case weighting system should be refined to provide a meaningful reflection of the work entailed in handling different types of criminal cases

The Agency does not have a workable caseload control system. A case weighting study is needed to determine the time it takes for various case activities. While there was a case weighting system presented to the Commission, the various weights assigned to a variety of cases are the product of unsupported perceptions and, in some instances, patently inappropriate. For example, all felonies are given the same weight. Obviously not all felonies should be in the same weight category, i.e. a capital murder should not be weighted the same as a felony theft, etc. Nor should a case that goes to trial be necessarily considered with the same weight as a case that is disposed of by a plea of guilty.

Recommendation 3. A meaningful system should be developed for evaluating the work of the lawyers.

Little to no evaluation of the work of lawyers occurs, although promised. The Agency must develop and use an evaluation system that is practical and that starts with case disposition and the process of disposition.

Recommendation 4. At a minimum, budget submissions should be supported by documentation describing the Agency's accomplishments presented in concrete terms.

Budget submissions to the Governor, Supreme Court, Legislature and Commission are woefully inadequate. In the almost three years since the Defender Agency began to fully function, there has been little effort to document the Defender Agency's accomplishments. The Agency must track case progress and present concrete information on case disposition. That information should, at a minimum, be categorized by type of case and provide case result, caseload and case dispositions for each separate lawyer.

Recommendation 5: The "minimal" caseload statutory requirement for the Chief Defender, Contract Manager and Regional Deputy Defenders should be reduced or eliminated.

Managerial staffs, including the Chief Defender, the Contract Manager, and Regional Deputy Defenders have a significant caseload. As a result, supervisory staff are too busy representing clients. They are not managing. The problem is not only the lack of time to manage; simply stated, the problem may be a lack of desire to manage or a lack of knowledge as to how to manage. The Agency is adrift. In the next legislative session the Commission should submit a legislative proposal to eliminate the "minimal" caseload requirement for the Chief Defender, Contract Manager, and Regional Deputy Defenders. Until the "minimal" caseload statutory requirement is eliminated, the management staff should not undertake more than one case at a time, and not serious cases. As it now stands there is little to no time for management.

Recommendation 6. The Commission must become more aggressive in demanding comprehensive, reliable reports of Agency activity.

The Commission meets often and regularly, but has not been effective in obtaining reliable information of the Agency's work. It must insist upon implementation of an adequate data collection system in each of the regional offices. Implementation of a complete data collection system will require that each regional office and the contract management office have an information retrieval system in place. The system must allow managers to have immediate access to present caseload data by attorney (including information about the critical details of each case), caseload assigned by attorney, caseload disposed and disposition method by attorney. A staff person in each region must have responsibility for data integrity to insure that data is entered accurately and in a timely manner into the system. This recommendation is the foundation for most management functions in a unified statewide agency. It is the foundation for most of our recommendations. Without adequate information this Agency will not be able to function effectively and with efficiency.

B. CONFLICT OF INTEREST CASES

Recommendation 7. A separate Conflicts Office should be maintained for trial and appellate cases with the director reporting to the Commission, not the Chief Defender.

Rules of law and professional ethics forbid a lawyer and a law firm from representing clients where the lawyer or law firm would have a conflict of interest. Situations of conflict arise in trial level criminal cases, usually, but are not limited to cases where two or more persons are charged with the same offense. Conflicts also arise in appellate cases where the appellate lawyer is in the same firm or organization as the trial lawyer, and issues of ineffective trial lawyer should be alleged. Conflicting interests may also arise in family law and mental health cases. All conflicts should be quickly identified and resolved. There is a system in place to identify conflict problems. However, the present method for resolving the conflict problem is inadequate.

Although Commission Standards conclude that the Regional offices, the Appellate office, and the Contract Manager office are independent for conflict purposes, we strongly believe that conclusion is unsupportable. The Chief Defender has complete and ultimate authority over Agency staff and contract lawyers. The Chief Defender hires, fires, disciplines and is to evaluate all lawyers and other staff in the Agency. She has the authority to exercise supervision and control over every aspect in the Agency's representation of clients. Obviously the Chief Defender should delegate to other managers; lawyers assigned to a case have the prime responsibility for that case. Nevertheless, the ultimate responsibility for representation of clients and the quality of that representation lies with the Chief Defender. Hence, the Regions created by the Commission are not independent and cannot be considered anything more than divisions within the Agency for managerial purposes and convenience.

Accordingly, we recommend that a separate conflicts office, trial and appellate, be maintained with its director responsible to and reporting to the Commission, not the Chief Defender. The Chief Public Defender should be totally without interest in this conflicts division. In the unusual event of three or more persons who require separate appointment of counsel, additional lawyers will have to be appointed by the trial judge. Those additional lawyers of course must be without any employment connection to the Defender Agency, as staff or by contract, and must be compensated from funds that are not part of or do not come from Defender Agency appropriations.

C. TRAINING AND CONTINUING EDUCATION

Recommendation 8: The Training Director should regularly survey staff and contract lawyers to determine what training they believe is needed.

Recommendation 9: Each training program should have systematic feedback and evaluations from attendees.

Recommendation 10: At the very least the following activities should be a part of the training functions.

- a. *The training office should prepare and distribute a separate trial book applicable to each category of case, e.g. misdemeanor, felony, appellate, juvenile, etc.*

Trial books should be continually updated and be provided to contract lawyers as well as staff lawyers.

- b. *The Training Director should be responsible for developing and implementing through Public Defender managers two introductory programs:*

First: an orientation program for all new staff, including an introduction to office processes and policies.

Second: an initial skills program for the attorney staff to introduce the attorneys to their professional duties.

The practice standards approved by the Commission should be introduced as part of the skills program. Thereafter, the Trainer should be available to managers to assist in continuing training to improve skills of staff they supervise. To the extent possible these services should be made available to contract attorneys through the Contract Director.

- c. *The Training Director and the Appellate Division are developing a brief bank. That activity should continue and periodically be upgraded.*
- d. *Every continuing education training program should continue to be recorded and the recordings made available to lawyers.*

Trial and motion practice demonstrations should be videotaped and the videos made available to staff. Practice demonstrations by staff lawyers should also be made on video to enable lawyers to observe their own performance.

- e. *A monthly newsletter summarizing recent noteworthy decisions from higher courts and of any changes in Agency policy and procedures should also be prepared and distributed.*

It is anticipated that additional staff may be required for the Training Director to implement these recommendations.

D. EVALUATIONS OF LAWYERS

1. General

Recommendation 11: An evaluation procedure for lawyers needs to be developed which is timely, is based primarily on objective data, and promotes the lawyer's professional development over the next year.

The primary intent of evaluations should be to develop the best staff possible. Therefore, they need to be fair, dependable and timely. They should end with the employee and the manager having a clear plan for the lawyer's professional development over the next year.

Commission Standards (IV-E4, 5) and Policy (135) require yearly evaluations of staff and contract lawyers, including all supervisors. To date there have been no formal evaluations. The Chief Defender, together with another supervisor, is required to be involved in every yearly evaluation of every staff and contract lawyer. As discussed earlier in this report, a manual has recently been published by the Agency describing the prospective evaluation process which, if it were to be implemented, is both impractical and of little value in terms of assessing lawyers' performance. It includes courtroom observations of staff and contract lawyers, interviews with various persons who have observed the lawyer's work, and conferences with the lawyer who is being evaluated. There is a rating scale to be used by the evaluators. Oddly, the process totally fails to include any assessment of the case process and case results. The proposed evaluation is entirely subjective, anecdotal and impressionistic. Objective factors relating to disposition of cases that should be readily and easily attainable are totally ignored. In addition, the procedures proposed in the manual cannot possibly be implemented without the supervisory staff being greatly enlarged—an unlikely event.

Among many Agency employees there is also a perception of unfair favoritism and fear of unwarranted retaliation for perceived criticism of management. Those impressions may be exacerbated by any attempted use of the entirely subjective procedure outlined in the manual.

In place of these procedures, we urge the adoption of the evaluation procedures outlined in Section III C of this report. Of course, adopting those procedures would require implementing the case reporting system recommended

2. Special Issues Relating to Contract Lawyer Supervision and Evaluation

Recommendation 12. Special procedures should be developed for evaluating contract lawyers, relying primarily on the information provided in the proposed closing documents.

Clearly, the problems of supervising and evaluating contract lawyers are somewhat unique from those of staff lawyers. In the more heavily populated regions, the Deputy Defenders have, or should have, their hands full with supervising staff lawyers and handling their own cases. Even with substantial reduction of their caseload, staff obligations make it unlikely that the deputy defenders could participate heavily in the contract lawyer evaluations.

Of course, any observations managers make of a contract lawyer who is representing an assigned client in court should be reported to the Contract Manager, if noteworthy. Otherwise, evaluations of contract lawyers should be primarily the job of the Contract Director. Although Commission policy directs the Chief Defender to also be involved, her involvement should be limited to oversight and not in the active evaluation process.

The evaluation of contract lawyers should initially be based upon case dispositions and the process for case disposition. The fee petitions and proposed case closing documents should be the first line, the primary source for information relative to contract lawyer performance evaluations. Deputy defenders in regions with little or no attorney staff can be more actively involved in evaluating contract lawyers in their regions, especially in gathering information from third parties such as judges and prosecutors. If the suggested case closing documents are adopted and tabulated, most problems are likely to be identified from these documents and the fee petitions, without the need for actual observation of the lawyer in court, thereby reducing the evaluation burden to a more manageable activity as well as bringing a degree of objectivity into the evaluation process.

***Recommendation 13.** A contract lawyer should be prohibited from having an assigned client becoming a fee client in the originally assigned case.*

A contract lawyer should be specifically prohibited from taking any money or benefit from an appointed client or from anyone for the benefit of the appointed client.

E. IMPLEMENTING EARLY CASE ENTRY

***Recommendation 14.** An emergency lawyer should be available 24 hours, seven days a week to ensure immediate provision of counsel in compliance with the Commission Standards.*

Commission Standard III-2 imposes the obligation to provide counsel "...as soon as the person is under investigation, arrested..." and at the initial appearance. However, there is no evidence that the Agency has seriously attempted to implement this standard. Indeed, as already noted, in some counties lawyers are not representing people at the initial court appearance.

Accordingly, it is recommended that implementation of this standard requires that each Regional Office require a lawyer, staff or contract lawyer, on a rotation schedule, to be designated as an emergency lawyer available 24 hours, seven days a week to provide his/her services when called. An agency emergency number should also be established in each Region for this service. Each police department and arrestee holding facility should be notified of the availability of an emergency public defender attorney and the telephone number of the duty lawyer posted in a plainly visible place in the police facility or holding cell area. If police agencies do not cooperate, a court order requiring cooperation should be requested. The availability of that service should be effectively advertised.

F. PLANNING FOR CASE OVERLOADS, BUDGETING AND OTHER RESOURCE NEEDS

1. Caseload Control and Overload

Recommendation 15. Management staff should develop a plan for situations in which case overloads occur, particularly when they coexist with budget shortfalls

There is evidence that at least some lawyers have too many cases. As noted earlier, the present system does not quickly present an up-to-date picture of caseloads of staff and contract lawyers so that cases can be intelligently assigned. At present cases are assigned to staff by rotation without regard to case inventories unless a lawyer complains of case overload. In the present Agency environment, many lawyers are unlikely to complain about their work load. Hence, they may neglect some preparation or fail to timely represent clients. Accordingly, it is essential that managers themselves identify excessive caseloads of staff.

Also, there are no plans in place to confront a looming problem of too many cases and budget shortfalls. Management must be prepared to quickly submit a supplementary appropriation request. That request must document the emergency with concrete factual data.

Management staff should develop a plan to address the excessive case assignment problem when additional funding is not available. Any plan developed must assure that Commission Standards addressing quality of representation are not diluted and must be submitted to the Commission for its approval. (See formal opinion 06-441, ABA Standing Committee on Ethics and Professional Responsibility.)

Recommendation 16. When caseloads of staff lawyers are at maximum levels for assuring effective levels of service and contract lawyer resources are exhausted, the Defender Agency must refuse to accept more cases.

The ethics of the legal profession require that a lawyer should not accept more cases than the lawyer can effectively and timely attend to. Defender lawyers are bound to that ethical requirement as are private practice lawyers. Accordingly, when a lawyer reaches the maximum number of cases she/he can handle, the lawyer must reject additional appointments. Any court order of appointment when the Agency has reached its maximum caseload should be challenged, and the Agency should be prepared to meet that contingency. Of course, it is essential that the Agency have reliable, up-to-date case numbers for each of its lawyers to support its refusal to accept appointments. Otherwise, challenging a court order of appointment cannot be justified.

2. Budgeting

Recommendation 17. Budgeting for the 2012-2013 biennial legislative session should begin immediately.

Among the specific requests to the Legislature should be the following:

- a. An increase in the contract lawyer hourly rate to at least the federal court rate for appointed lawyers.
- b. Action to ensure that the salaries of defender staff attorneys are on a par with salaries of other state employed lawyers.

There is evidence that defender staff lawyer salaries are on average considerably lower than salaries of other state employed lawyers in Montana. Those salaries must be raised to be on par with salaries of other state employed lawyers. The Union that represents Defender Agency staff should be utilized to convince the Legislature to remedy this unwarranted discrimination. If this discrimination continues, experienced, quality defender lawyers will be lost to other government offices.

- c. The “minimum” case requirement for all managers, including the Chief Defender, should be stricken from the Defender legislation.

If managers want and have time to represent a defender client or two, they should be allowed to do so only if they are adequately performing their management duties.

It is foreseeable that there will be a need to increase Agency personnel at management, staff and support levels. Implementation of the recommendations in this technical assistance report may require additional staff. The Commission should not hesitate in making such requests. For such requests to be persuasive, however, they must be supported by concrete data.

Recommendation 18. There should be a separate fund category for emergency situations. Some examples where contingency reserve funds are essential are the high profile case, instances of extreme community disorder, and other catastrophic events.

G. IMPROVED COMMUNICATION BETWEEN THE CHIEF DEFENDER AND STAFF

Recommendation 19. The Chief Defender should communicate with staff regularly regarding the application of policies and procedures to OPD office operations, staff compensation, evaluation, etc., as well as any proposed changes in these policies.

Issues relating to existing policies and procedures as well as any changes or additions to these policies, standards, or other internal Agency procedures should immediately be disseminated to staff. As it stands now such communication is seriously inadequate.

Recommendation 20. The rationale for distribution of resources to Regions must be published, explained and supported by facts.

As noted earlier in this report, there is presently the appearance of unjustified and uneven distribution of resources among the Regions. Billings/Region 9 is a prime example of perceived disproportionate allocation of resources. It has a comparatively high caseload, yet receives considerably less resources than other regions with a smaller caseload. If this is somehow justifiable, the justification should be demonstrated and communicated. If not justified, the allocation of resources should be adjusted. The recent addition of two lawyer slots in Region 9 is helpful. Unfortunately, on the basis of known facts, Billings is still under funded and still without explanation to justify the disproportionate funding.

Recommendation 21. Special effort should be made to remove the fear of retaliation from management for publicly noting Agency problems.

A number of staff believes there is blatant, unfair favoritism displayed by top management. Some also fear inappropriate retaliation from top management if they were to file a grievance, complain of having too many cases, or alert managers to other problems. Of course, any basis for such an impression must be eliminated. Also, staff must be assured that unwarranted discriminatory or retaliatory practices do not occur.

H. REAFFIRMING THE COMMISSION'S AUTHORITY

Recommendation 22. The Commission must demand accountability from staff for implementing its promulgated standards and policies and for providing competent, efficient representation.

Pursuant to its mandate from the Montana Legislature (47-1-105 of the 2005 Montana Defender Act), the Commission has adopted standards and from time-to-time has issued administrative policies. However, there has not been any objective information illustrating implementation of those standards and policies. Indeed, there is evidence that some standards are not met, and that some policies have not been implemented. It is the obligation of the Commission to enforce its Standards and to cause its Policies to be implemented.

The Commission is without its own staff. Commissioners are not financially compensated; they have their own law practices or other occupations and meet only periodically. Hence, it is the duty of the Chief Defender with her staff to provide the information necessary for the Commission to function. The Commission must insist upon receiving adequate information. Having accurate, adequate, current, and objective information from staff should be the Commission's present and most pressing priority.

Recommendation 23. The Commission must become considerably more assertive in demanding relevant information from staff.

The function of the Defender Agency is to effectively and efficiently represent their clients. The Commission has established Standards to guide staff. It is the duty of staff to prove that standards and policies are followed. It is the obligation of staff to prove its

effectiveness and efficiency to the Commission, the Governor, and the Legislature. The staff has failed to do that.

Recommendation 24. The Commission should also raise challenging questions and provoke management into considering new options.

The obligation of the Commission is to question! The managers must respond! For example, how will staff respond to a sudden and unexpected riot or demonstrations where large numbers of people are arrested?

Recommendation 25. The Commission should consider selecting a secretary from its own ranks or hiring a person for that job and not rely upon the Chief Defender to act as secretary to the Commission.

The Commission should consider hiring a staff person to provide support for its operation. Presently, it appears to rely on the Chief Defender and the Administrative Director. Neither the Chief Defender nor any other OPD staff member should hold any position on the Commission.

Recommendation 26. The Commission should insist that definitive lines of authority be established, published and be included in job descriptions and be communicated to all staff.

While it is crystal clear that Randi Hood is the Chief Operating Officer of the Agency, other levels of authority have not been as clearly delineated. For example, who, or what position, is the second in command? Who is in charge when Ms. Hood is ill or on vacation or involved in a trial? Where does the Contract Manager stand in the line of authority in regard to the regional deputy defenders and contract lawyers within the regions? Where does the position of Training Director fall in the managerial hierarchy? Does he have authority to require staff lawyers to attend training sessions? Does he have authority to plan, schedule, and impose training requirements for the regions, or is that the prerogative of the regional deputies? Where does the Chief Administrative Officer stand in the line of authority? May he impose administrative procedures for the regions, or are those matters within the prerogative of the Deputy for the Region?

Recommendation 27. The Commission should consider imposing its own limitations upon the private practice of law by a defender staff member at all levels of authority within the Defender Agency.

A recent ethics opinion by the Montana Bar Association appears to find no prohibition against a Defender staff lawyer taking on private clients in civil cases as long as there is no interference with defender duties, and is done on the lawyer's own time. The Commission should develop more definitive guidelines for Defender staff attorneys regarding this issue.

Recommendation 28. The Commission should require a strategic plan from each region that, among other things, results in measurable improvement in supervision, management, retrieval of information, and evaluation of staff.

Recommendation 29. The Commission itself should evaluate and assess what statutory provisions have been adequately satisfied and where it has fallen short.

Montana's Defender Legislation spelled out a number of specific duties of the Commission. Commissioners should examine those provisions (47-1-104 (1) (2) (3), 47-1-105, Montana Defender Act, 2005) to determine what provisions have been complied with and which may not have been at this point. To make this assessment, the Commission must rely on information from Agency staff. The Commission must be insistent on a continuous flow of relevant information.

I. MISCELLANEOUS

Recommendation 30. Commission members and Agency management should be active in proclaiming the value of the Agency throughout the state and should speak to civic organizations, schools, and other community groups regarding the role which the Agency plays in the community.

Criminal defense is often not an undertaking most people see as valuable. The Public Defender is a new state agency using taxpayers' money to defend people charged with murder, rape, robbery and other mayhem. It is essential that the Agency demonstrates that it is an important part of law enforcement. It enforces the constitutions of the United States and the State of Montana. Hence, its value to the public must be brought to the attention of the public. Commissioners and staff should elicit invitations to speak at schools, civic organizations, private clubs, etc. to describe the need for the Agency and tell of its contributions to society in general and law enforcement in particular. After all, the Defender Agency protects the constitutional rights of all citizens when it enforces those rights for their clients.

Recommendation 31. Investigative resources should be provided for misdemeanors as well as felonies.

As noted earlier in this report, the study team was informed that, recently, lawyers have been instructed that they may not use investigators when preparing to defend clients charged in only misdemeanor cases. If that is true, that restriction should be rescinded immediately. A defense lawyer must have investigation done on all cases. Investigators are essential for a number of reasons. First: using investigators is more efficient than having the lawyer do all the investigation. Of course, a lawyer must also prepare for certain contingencies such as always examining the crime scene. Second: a lawyer cannot testify at trial. Hence, the second essential need is to have the investigator prepared to testify when necessary, such as, when impeaching a prosecution witness by a prior statement that is inconsistent with the witness' testimony. Conviction of a misdemeanor can be very serious. It may disqualify the person from certain occupations

later in life. It is often the first step in the ladder of progression to evermore serious crime. It is important to as vigorously represent clients in misdemeanor cases as in other cases.

Recommendation 32. All lawyers should have authority to use automated legal research engines when necessary.

We were informed that not all lawyers in the Defender program are authorized to use research tools, such as Lexis and/or Westlaw, at Agency expense. Such a restriction hampers the research ability of the excluded lawyers and is detrimental to morale.

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VI. CONCLUSION

Montana's Public Defender Statute creates the framework for an exemplary statewide public defender system, establishing a foundation for delivering a wide array of high quality indigent defense services in a range of both criminal and civil matters.

The drafters of the legislation should be commended for both their commitment to ensuring that the constitutional right to counsel is a reality as well as their vision in creating the structure for a system that can be implemented in the diverse environments that characterize the state. The Commission established by the legislation has done an admirable job in creating standards and policies that can guide the system's implementation. The immediate task now is to develop the management structure, operational mechanism, and information to ensure that the system design is, in fact, implemented as intended.